In the

United States Court of Appeals

For the Seventh Circuit

NATIONAL LEAD COMPANY,

Petitioner,

No. 10839 *vs.*

FEDERAL TRADE COMMISSION,

Respondent.

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

No. 10840 *vs.*

FEDERAL TRADE COMMISSION,

Respondent.

THE EAGLE-PICHER COMPANY, ET AL.,

Petitioners,

No. 10841 *vs.*

FEDERAL TRADE COMMISSION,

Respondent.

ANACONDA COPPER MINING COMPANY, ET AL.,

Petitioners,

No. 10842 *vs.*

FEDERAL TRADE COMMISSION,

Respondent.

Petitions for Review of Order of the Federal Trade Commission.

INDEX.

Colloquy 987, 1432, 1671, 1711

WITNESSES FOR THE COMMISSION.

Testimony of:

Burke, W. A. 977
Eagan, Patrick Joseph 926
Florence, Fred 914
Hester, Eugene Nelson 961
Kita, Joseph J. 894
Lazar, Sol 872
Lunkes, John W. 893
McKinley, Frank F. 970
Perry, Ward S. 878
Rhoades, W. C. 919
Steiner, Perry 955
Taylor, Geo Washington 932

WITNESSES FOR RESPONDENTS.

Testimony of:

Bates, Henry O. 1722
Baum, Edward L. 1684, 1697, 1702
Burress, David N., Jr. 1691
Carroll, Walter P. 1588
Doudorf, Ernest W. 1714
Hesselbrock, J. H. 1738
Higgins, J. R. 1567, 1604
Matthiessen, C. S. 1582
McCarthy, Fred K. 1543
McNair, John Gordon Crawford 1496
Simon, Charles 1713
Sprague, Paul E. 1236
Tibbets, Albert B. 1446
Werne, Leonard 1669, 1681
Wormser, Felix E. 1041

1830 Room 1123, New Post Office Bldg.,
Chicago, Illinois,
November 14, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

1831 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing is now convened in Room 1123, New Post Office Building, Chicago, Illinois, at 10 o'clock a. m., on November 14, 1946.

Kindly enter the appearances.

With regard to the hearings that have been arranged for and tentatively agreed on by counsel, I will read this program into the record, including the postponement of the Washington hearing which we discussed yesterday.

It is our intention, then, to follow the following schedule so far as it may be found practicable:

November 18, 1946, at 10 a. m. cst, 1 day, Room 527, U. S. Court House, Kansas City, Missouri.

November 19, 1946, at 10 a. m. cst, 1 day, Room 313, Federal Building, St. Louis, Missouri.

November 21, 1946, at 10 a. m. cst, 1 day, Room 245, U. S. Court House, Nashville, Tennessee.

November 22, 1946, at 10 a. m. cst, 1 day, Room 210, Jefferson County Court House, Birmingham, Alabama.

December 11, 1946, at 10 a. m. est, 2 days, in the Trial Examiner's Hearing Room, Room 332, Office of the Federal Trade Commission, Washington, D. C.

Mr. Wright: Off the record.

1832 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed. Call your witness.

Mr. Wright: I will call Mr. Lazar.

SOL LAZAR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address, Mr. Lazar?

A. Sol Lazar, 1446 South Wabash Street, that is the factory.

Q. What is your business?

A. Battery manufacturing.

Q. Battery manufacturing?

A. Yes.

Q. What is the name of your business?

A. The Excel Battery Company.

Q. And that is located at 1446 South Wabash Street?

A. Right.

Q. Is that a corporation?

A. No.

1833 Q. Is it a partnership?

A. I am the owner.

Q. You are the owner?

A. Yes.

Q. For how long a period of time have you been in that business?

A. About 25 years.
Q. At that same place?
A. Yes.
Q. And under that same name?
A. Right.
Q. What type of storage batteries do you manufacture?
A. The Excel Battery, that is mostly for automobiles.
Q. Automotive batteries?
A. Yes.
Q. Are they replacement batteries?
A. Call them that way if you want.
Q. About how many batteries do you make in a normal year?
A. Approximately between 75 and 125 a day.
Q. Between 75 and 125 a day?
A. Yes.
Q. Where do you sell those batteries that you produce?
A. Mostly in Chicago and surrounding territory.
Q. Well, how much territory around Chicago do you include?
A. Let's say 25, 30, let's say 50 miles around.
1834 Q. Is it principally in the metropolitan Chicago area?
A. Metropolitan Chicago principally.
Q. What are your principal competitors in that area, Mr. Lazar?
A. Anybody that manufactures batteries.
Q. Would that include National Battery Company?
A. Well, are they manufacturing batteries?
Q. Well, now, I am asking you if you recognize them as a competitor?
A. They used to be in the olden days, but now they claim they are separated from the National Battery Company in the other places.
Q. In the period from 1936 to 1941, was National Battery Company a competitor of yours in this area?
A. No.
Q. They were not?
A. That is, not that I know of.
Q. Would your competitors in that period include Willard and Exide?
A. Yes.
Q. Bowers?
A. Not in Chicago.
Q. Not in the Chicago area?

November 21, 1946, at 10 a. m. cst, 1 day, Room 245, U. S. Court House, Nashville, Tennessee.

November 22, 1946, at 10 a. m. cst, 1 day, Room 210, Jefferson County Court House, Birmingham, Alabama.

December 11, 1946, at 10 a. m. est, 2 days, in the Trial Examiner's Hearing Room, Room 332, Office of the Federal Trade Commission, Washington, D. C.

Mr. Wright: Off the record.

1832 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed. Call your witness.

Mr. Wright: I will call Mr. Lazar.

SOL LAZAR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your full name and address, Mr. Lazar?

A. Sol Lazar, 1446 South Wabash Street, that is the factory.

Q. What is your business?

A. Battery manufacturing.

Q. Battery manufacturing?

A. Yes.

Q. What is the name of your business?

A. The Excel Battery Company.

Q. And that is located at 1446 South Wabash Street?

A. Right.

Q. Is that a corporation?

A. No.

1833 Q. Is it a partnership?

A. I am the owner.

Q. You are the owner?

A. Yes.

Q. For how long a period of time have you been in that business?

A. About 25 years.
Q. At that same place?
A. Yes.
Q. And under that same name?
A. Right.
Q. What type of storage batteries do you manufacture?
A. The Excel Battery, that is mostly for automobiles.
Q. Automotive batteries?
A. Yes.
Q. Are they replacement batteries?
A. Call them that way if you want.
Q. About how many batteries do you make in a normal year?
A. Approximately between 75 and 125 a day.
Q. Between 75 and 125 a day?
A. Yes.
Q. Where do you sell those batteries that you produce?
A. Mostly in Chicago and surrounding territory.
Q. Well, how much territory around Chicago do you include?
A. Let's say 25, 30, let's say 50 miles around.
1834 Q. Is it principally in the metropolitan Chicago area?
A. Metropolitan Chicago principally.
Q. What are your principal competitors in that area, Mr. Lazar?
A. Anybody that manufactures batteries.
Q. Would that include National Battery Company?
A. Well, are they manufacturing batteries?
Q. Well, now, I am asking you if you recognize them as a competitor?
A. They used to be in the olden days, but now they claim they are separated from the National Battery Company in the other places.
Q. In the period from 1936 to 1941, was National Battery Company a competitor of yours in this area?
A. No.
Q. They were not?
A. That is, not that I know of.
Q. Would your competitors in that period include Willard and Exide?
A. Yes.
Q. Bowers?
A. Not in Chicago.
Q. Not in the Chicago area?

A. That is right.

Q. To what type of customer do you sell?

1835 A. Garages and service stations.

Q. Do most of your customers resell the batteries to the general public?

A. Yes. We are catering to the smaller people, no department stores, no chain stores; we don't sell to them at all.

Q. Under what trade names are your batteries sold?

A. Excel.

Q. Excel?

A. Yes.

Q. You make no other brands?

A. No.

Q. Are you in competition with Sears Roebuck and Montgomery Ward in the battery business in normal times?

A. Well, we can't compete with them.

Q. Are they selling in competition with you?

A. They are.

Q. Would you explain your answer that you can't compete with them?

A. I mean they are selling a line of merchandise that is way under our price, for less money.

Q. How does that affect your business?

Mr. Welch: Objection.

A. Well, it certainly does. A man will go and buy merchandise wherever he can save a dollar, two or five.

By Mr. Wright:

1836 Q. How many different types of batteries do you manufacture?

A. Types? What do you mean, brands?

Q. No, sizes and kinds.

A. Various, about 8 or 9, a battery to fit any car, different sizes and types.

Q. About how many sizes and types does that include?

A. About nine, I believe.

Q. About nine sizes and types?

A. Yes.

Q. Do those sell at various prices?

A. Various prices.

1837 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. When you stated a minute ago that you can't compete with Sears Roebuck in this area did you mean on your whole line of batteries?

A. Yes.

Q. On all of them?

A. Well, especially on the lower grades, on the lower-priced batteries.

Q. What batteries are those, the lower-priced ones?

A. Well, batteries,

Q. Of what construction? Are they 15-plate or 13-plate batteries?

A. We make nothing less than 15-plate; 15-plate is the lowest we make, no 13-plate.

Q. On a 15-plate, 3-cell battery in Group 1, what was your selling price in 1941?

A. The selling price to the service station?

Q. Yes, sir.

A. Approximately $7.00—$7.25 or thereabouts.

Q. That was in 1941?

A. Yes, that is right.

Q. What did you sell your cheapest battery for at that time?

1838 A. At that time we also made a battery to sell for $4.85. That was a 13-plate battery but we don't make them any more.

Q. That sold at $4.85?

A. Yes, at the store.

Q. Do you recall your costs of production on that 13-plate battery?

A. I couldn't give it to you exactly, I don't know.

Q. Can you give us an estimate of your costs at that time?

A. Approximately between $3.00 and $3.25, or rather—between $3.00 and $3.50.

Q. Between $3.00 and $3.50?

A. Yes.

Q. What does that include; does that include the labor of making the battery?

A. Yes, everything.

Q. And all the materials?

A. Yes.

Q. And your overhead?

A. Well, yes. That battery sold practically at cost in order to get the line in with the customer.

Q. In other words you sold that at a lower margin than your other batteries?

A. Away lower.

Q. Why did you do that?

A. To be with the customer, not to fall away entirely.

1839 Q. Did the prices at which your competitors were selling batteries in this area influence your making of that battery?

A. Naturally, of course. Otherwise I wouldn't have to.

Q. Can you tell me about how many pounds of lead oxides went into the manufacture of that battery?

A. That is a question I cannot answer. We never figured it. We made them and sold them and got our money for them, and that is as far as we went.

Q. Can you tell us how much lead altogether went into the battery?

A. A battery will usually take around between 40 and 45 pounds of lead.

Q. A 13-plate battery?

A. No; we haven't been making the 13-plate for a long time, not since 1941. That is the battery of today; at that time it took approximately 10 pounds less.

Q. You are talking about oxides or lead altogether?

A. Altogether; we never separated them.

Q. From whom do you purchase oxides, Mr. Lazar?

A. National Lead.

Q. Have you ever purchased from any other company?

A. No.

Q. On what price basis do you purchase?

A. Well, they usually issue prices every so often, they used to. During the war time there was no issue

1840 of prices whatever. We paid whatever the price was and had confidence in them that they were right.

Q. Were your purchases on the carload basis?

A. Not during the war, we couldn't get it. There wasn't any to be gotten at carload prices. Previous to the war, yes.

Q. Did you always buy at carload prices before the war?

A. No, it was what we called twenty ton.

Q. That is a carload, 20 tons. Did you ever buy in five ton quantities?

A. Yes, continually during the war.
Q. Did you buy in five ton quantities prior to the war?
A. No, very seldom.
Q. Very seldom?
A. Only in an emergency, to fill in.
Q. You have never at less than a five ton price?
A. No.
Q. Going back to the period of time now from 1936 to 1941, you stated, I believe, that the 13-plate battery carried a very narrow margin at the price at which you sold it?
A. Right.
Q. If you had at that time, Mr. Lazar, been able to save on your material costs five cents per battery through being able to purchase lead oxides at, say, half a cent lower than you were able to, what effect would that have had on your business?

1841 Mr. DuBose: The same objection, Your Honor.
Trial Examiner Norwood: Which was—
Mr. DuBose: The one we have continually made to this line of questioning.
Mr. Wright: It is the objection that your Honor has ruled on several times in the past.
Mr. DuBose: The same objection, yes.
Trial Examiner Norwood: Objection overruled.
Mr. Wright: Will you read the question, please, Mr. Reporter?
(The reporter read the question.)
The Witness: A half a cent on a pound would mean a lot of money, considering our profit in those days.
Mr. Wright: No further questions.
Mr. DuBose: May we have just a short recess?
Trial Examiner Norwood: Certainly; we will have a short recess.

(A short recess was taken.)

1842 Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Mr. Lazar, did you receive a subpoena telling you you had to come here?
A. Yes.
Q. You did not volunteer to be a witness here?
A. No.

Mr. Wright: No further questions.
Mr. DuBose: No cross-examination.
Trial Examiner Norwood: Thank you, Mr. Lazar. You may go now.

(Witness excused.)

Trial Examiner Norwood: Let us proceed, gentlemen.
Mr. Wright: I will call Mr. Perry.
Trial Examiner Norwood: Your name is—
Mr. Perry: Mr. Ward S. Perry.

WARD S. PERRY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Perry, will you state your business and business address?

1843 A. We are located at the present at 1000 East 87th Street, Chicago, Illinois. We manufacture automotive storage batteries.

Mr. Hinds: I did not hear the name of the company.

By Mr. Wright:

Q. What company is that that you are affiliated with?
A. The Volta Battery Company.
Q. How long has that corporation been engaged in the battery business?
A. We originally incorporated the Volta Battery Corporation in 1939. We some time later changed to a partnership, and changed back to a corporation the first of January, 1946.
Q. Were you an officer of the first corporation?
A. Yes.
Q. What was your position?
A. President.
Q. Were you a partner when it was a partnership?
A. I was the major partner.
Q. Are you presently an officer of the present corporation?
A. I am president of the present corporation.
Q. Was the Volta Battery Corporation a new enterprise in 1939?

A. Yes.
Q. It entered the battery business at that time?
A. Yes.
1844 Q. What was your output of storage batteries in 1939, do you recall?
A. It was between six and seven thousand batteries.
Q. In 1940 what was your output?
A. About eleven thousand.
Q. In 1941?
A. About fourteen thousand.
Q. Now, did you make a complete line during those years of—
A. Full line.
Q. —of automotive replacement batteries?
A. Yes.
Q. What was your market area; where do you sell batteries?
A. Mainly in the area of 300 miles radius.
Q. Of Chicago?
A. With the major part going right into the immediate Chicago territory.
Q. I see. Now, what was the principal competition that you have encountered in this market area?
A. Well, all companies serving the trade in this area.
Q. That would include would it, all the larger companies that sell in this area?
A. All the national concerns that sell batteries in the national way of course, in this territory.
Q. And you are also in competition with the
1845 smaller manufacturers located here in Chicago?
A. Yes.
Q. Now, to what type of customer do you sell generally?
A. We sell jobbers, automobile dealers, service stations, and garages.
Q. In other words, by what proportion of your business do you estimate as to those who resell at retail direct?
A. I do not know the figures. I would have to guess.
Q. A rough approximation?
A. I am just trying to figure. I would say that we sell retail or those who sell to the car owner, about seventy-five to probably eighty per cent of our batteries.
Q. Now, under what trade name or names are your batteries sold?
A. Volta Battery Corporation only, Volta.

Q. You do not make any private brands?

A. There is one concern we made a few batteries for, under the name of Mohawk, but that is a very small portion of our output. Those batteries are the name that this particular concern uses to sell, mainly to the city of Chicago, the police department, fire department, so forth.

Q. Now, during the period of 1939, 1940 and 1941, did you make a 13 plate battery?

A. Yes.

Q. What was your selling price of that battery 1846 at that time, do you recall?

A. We made two 13 plate batteries; one costs more than the other, but I suppose you are referring to the cheap one.

Q. Give us both if you will, if you can recall, the prices.

A. I do not recall the prices but they were pretty low.

Q. Were they both—

A. They were both under capacity batteries, and we do not recommend the use of an under capacity battery for an automobile.

Q. Now, what do you mean by under capacity?

A. The capacity that is smaller than the original battery that came equipped with the car.

Q. Do you recall the lowest price at which you sold the cheapest of those during that three year period?

A. It think it was about $2.85.

Q. That was your price to the dealer or distributor?

A. Our lowest price. That would be the jobber price.

Q. Yes. Now, do you recall how many pounds of lead went into that cheapest battery?

A. No, I do not.

Q. Can you give us an approximation?

A. I will have to do a little checking without having my figures. (After checking.) I would say roughly, without checking my exact plates, of about 15 pounds.

1847 Q. Does that include both the oxides and metallic leads?

A. Yes.

Q. What proportion would the oxides be in that?

A. About 45 per cent.

Q. About 45 per cent?

A. Yes.

Q. Do you recall what your cost of production was on that battery in that period?

A. It was just about what we were selling at.
Q. Approximately your selling price?
A. Yes. When you say cost what do you mean by cost?
Q. I mean your cost of materials and the labor of putting the battery together.
A. Material, labor and shop expense?
Q. Yes.
A. Yes.
Q. So that when you sold at that price, then you incurred the loss by the amount of your executive overhead—
Mr. Welch: I object. It is leading.
Trial Examiner Norwood: Sustained.
Mr. Wright: I withdraw the question.

By Mr. Wright:

Q. Was your selling price on that particular battery lower than the prices on your other items?
A. Very much lower.
1948 Q. Why was that?
A. To meet competition. This only represented five per cent of our sales.
Q. Just this one particular battery?
A. Yes. We went after quality business. We only did that to help out some of our customers who might want a few of those cheap batteries and we sold it under protest.
Q. In other words, you did not enjoy being in that particular line?
A. No, we did not like to sell it. As soon as we could we quit making it.
Q. Do you recall what competition it was that required in that area, the selling of a battery such as that?
A. Mostly the small, gyp, cheap battery companies.
Q. Do you recall Powers Battery Company, Reading, Pennsylvania, selling in that market, selling at that time?
A. I do not believe at that time they were selling in this market.
Q. Have they been in this market, to your knowledge?
A. No. Wait a minute. They did establish a plant, I guess, shortly after we started the Volta Company, and their plant was located in Harvey.
Q. Illinois?
A. Yes.
Q. Do you recall the prices at which Sears Roebuck
1849 was selling comparable batteries in that period of time?

A. No, I do not.

Q. During the period of time 1939, 1940 and 1941, on what price basis did you purchase lead oxides?

A. I really do not know.

Q. Do you recall the quantities in which you purchased?

A. Small, less than carload lots.

Q. Less than carload lots?

A. Yes.

Q. In that period of time in which we have been discussing now, what was your over-all margin of profit? What was your margin, your over-all margin of profit in 1939, 1940 and 1941, on the per battery basis, if you can state it that way?

A. You mean our markup above costs to our lower price?

Q. No, your profit, your net profit on your operations?

A. Well, in the first year, in the first sixteen months, we suffered a loss.

Q. Now that would bring you up to what time?

A. July 1, 1940.

Q. July 1, 1940?

A. Yes.

Q. Now, in the period from July 1, 1940 to the end of 1941, can you state what your—

A. The end of 1941—

Q. —your profits were?

1850 A. Oh, I think that we were about one thousand, twelve hundred dollars ahead, which I could have wiped out by certain writeoffs which I later did.

Q. That is after paying salaries, taxes, and all expenses?

A. Yes. We had certain installation expenses, that we carried as an asset on our books when we first started and we wrote those off gradually, as the years came on, because it did not really represent as asset, on liquidation.

Q. From what companies have you purchased lead oxides over the period?

A. Only from the National Lead.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. DuBose.

Q. Mr. Perry, in what business were you prior to 1940—prior to 1939?

A. I was, from about 1929, at that time, in the security business, and prior to that—

Q. Securities?

A. Yes, and prior to that I was in the battery business, going back to 1902.

Q. So you were familiar with batteries and the market conditions in the batteries?

1851 A. Yes.

Q. When you incorporated the Volta in 1939?

A. Yes. I had two of my men with me who started with me in the old Vesta Company in 1911 and 1912.

Q. And you knew in 1939 when you went back into batteries, that it was a highly competitive field?

A. Sure.

Q. And you went in with your eyes open, hoping to make a profit?

A. Yes.

Q. And you are still in the battery business?

A. Yes.

By Mr. Wood:

Q. Have you ever purchased lead oxides from the Eagle-Picher Company?

A. Not with the Volta battery.

Q. What?

A. Not as the Volta Battery.

Q. Are you familiar with their products?

A. We, in the old days, in the Vesta, when I was head of the Vesta Battery Company, bought lead and oxides from the Eagle-Picher at times; both National Lead and Eagle-Picher.

Q. Now, between the time you were with the Vesta Company and in the old days, 1939, when you went into the battery business, was there any particular technical

1852 improvement in the manufacture of batteries?

A. You mean in just what way—in the matter of assembling batteries?

Q. All the way through. I mean, in the products going into them, the manner of assembling, the quality of the finished product. Did the battery art advance in that period?

A. I think the battery art has advanced right along. In that period I would say one of the major improvements was in the use of fiber glass insulation.

Q. How about the lead oxides; weren't they given surface, greater surface area and things of that sort?

A. Oh sure, I am quite sure there was.

Q. Now, when you went back in the battery business in 1939, did you have any assistance or instruction in respect to the best technique for making battery plates?

A. Well, I went to the National Lead Company and took their recommendation on the type of oxides that we should buy.

Q. Did they also help you in telling you how battery plates were economically produced in quantity?

A. Yes.

Q. That is, they gave you certain technical assistance in the manufacture of storage batteries?

A. Yes, and have right along.

1853 By Mr. Hinds:

Q. Have you been solicited by Hammond Company of Hammond, Indiana, about their oxides?

A. I think most all of the oxide companies have solicited our business.

Q. Have you been solicited by Metal Refining Company of Hammond, Indiana?

A. I think so, yes.

Q. And do you recall whether the prices at which they solicited your business were different from those of National Lead?

A. No, I never checked prices because I preferred to do business with National Lead Company.

Q. And whether the prices were higher or lower or the same that was not a factor in your dealing with National Lead Company as distinguished from—

A. It was not.

Q. Is that right?

A. Yes. I think we could have bought lead a little cheaper from the Hammond Company. I heard other concerns talk about that.

Q. Is it not a fact that you could have bought lead considerably cheaper from the Metal Refining Company?

A. I do not know, but I think that Hammond were selling oxides about a quarter of a cent under. You

1854 see, when we started in the business, we were old

battery men and we made up our minds that we were going to build the best battery we knew how to and get a fair price for it.

Q. Do you find that there are differences in official characteristics and results being obtained between lead oxide of one producer and lead oxide from another producer?

A. Yes, there is a difference. Now, for instance, the National Lead Company developed what we term their hydro-set process, about over a period of a good many years, and offered it to us, I think it was in September, two years ago.

Q. Would you say that these different lead oxide producers offer identical products, or offer products giving substantially the same, or differing substantially in quality and utility?

A. I do not think that anyone is offering similar oxide to the National Lead at the present time.

Q. Well, can you make that same statement with respect to others differing among one another?

A. I do not know. I have not had any recent experience. I could not tell you.

Q. You say that National Lead differs from all of the others. You do not know whether the others differ among others?

A. I will tell you what that difference is now: In manufacturing lead oxide, you take the pig of lead and
1855 you burn it in a furnace. They use, they carry the oxidation in the red lead to a full oxidation, with no metallic content. You first have to make litharge, which is a lower oxide than the red lead.

Now, in this new process, or I might say, in the old method, you would mix that with your sulfuric acid and place it in your plates and dry them completely.

Now, in the handling of those plates, completely dried, caused considerable more dust than is now the case, so that your hazard of lead poisoning to your men was considerable if you did not take the necessary precautions. In this new development that the National developed, and which we were the first ones to use in Chicago, they call it the hydro-set process, they carry the oxidation only partway, leaving a certain amount of metallic content in the oxide. Presumably about thirty per cent of your oxide is metallic content.

That is true with your positive acting material. The result was that they reduced their price on the litharge, on the red leads, to the same price as litharge, which was before added, one quarter of a cent differential.

Now, you mix that oxide with your paste, as you formerly used to, and you would paste that into your grids, instead of drying out completely, you would just dry the surface of the plates, so that they would not stick together.

1856 The oxygen in the water, remaining in the plate, and the oxygen in the air, started to oxidate that metallic content that was left in the oxide, as we bought it, and you reduced that or oxidated it down, leaving only about one to two per cent of the metallic content, so you carried on the oxidation of your oxide, while it was, after it was pasted into the plate, so you were continuing the process of forming oxide in your plate, where the old method, you did not do that.

Q. Then you say in the new method—

Mr. Wright: Your Honor, just a minute, please. I move to strike so much of that answer as related to the technical processes of the manufacture of the pigment, because it is obviously is incompetent. It is obviously hearsay, because this witness by his own testimony has never been connected with one of the producers of pigments.

Now, my objection goes only to so much of that answer as relates to the actual production of the pigment. I will not object to the inclusion of the statement of the method of making plates.

Mr. Hinds: I understand he was describing what was happening in his own battery.

Trial Examiner Norwood: You answered from your own knowledge?

The Witness: Yes.

1857-1858 Mr. Wright: May I examine him briefly on that?

Trial Examiner Norwood: Well, you may examine him on his knowledge.

The Witness: I am just trying to give you a picture—

Mr. Hinds: Would it not be better to wait for the finish to the answer and my cross?

Trial Examiner Norwood: Motion denied. I want to ask you off the record—

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Trial Examiner Norwood: Does that condition make for longer life in the battery?

The Witness: I consider it does.

By Mr. Hinds:

Q. Now, have you finished your answer to my previous question?

A. Well, what was your previous question? I was trying to give you—

Q. I think my previous question, to save time—

Trial Examiner Norwood: He was explaining the difference between this lead situation.

By Mr. Hinds:

Q. I asked whether it was a fact that there are substantial differences, in physical characteristics and in
1859 results between one oxide and another as offered by producers?

A. That is—

Q. And your answer was "yes" and you undertook to tell some of the differences?

A. Yes.

Q. Now, these differences that you have described are something you regard as advantages in favor of the new method, is that right?

A. Yes.

Q. Do the other competing producers offer these advantages in their oxides?

A. To my knowledge, I do not think they do because I have asked whether there is any metallic lead—for instance, in the oxide, as furnished by Eagle-Picher, and I have been told that this is not metallic oxide, no metal, no metallic content in the oxide.

Q. Now, you say that Hammond Company of Hammond, Indiana, has offered you lower prices?

A. No, they did not. I have been told by other battery manufacturers that the prices they were paying were—

Q. Lower?

A. Yes.

Q. Do you know of any other producers that have offered prices lower than those of National Lead?

A. Well, I have never attempted to get the other
1860 fellow's prices, so I do not know.

Q. You do not know what they are?

A. No.

Q. Have others solicited you through salesmen coming to your premises?

A. Oh yes, they have come around and called on us with the hopes that we might give them some business.

Q. Have any of them mentioned price?

A. No, never got to that point.

Mr. Hinds: That is all.

By Mr. DuBose:

Q. Mr. Perry, you have been dealing with National Lead since 1939?

A. Yes, and before in the old company.

Q. And in the old days?

A. Yes.

Q. And they gave you technical advice and assistance in—

A. Yes.

Q. And you are satisfied with the National Lead Company services?

A. Perfectly.

By Mr. Wood:

Q. What was the name of this new process that you mentioned before?

1861 A. They call it hydro-set process.

Q. Hydro-set?

A. Yes.

Q. Is it your understanding that is a patented process?

A. Yes.

Q. You spoke of these lead oxides. The oxide, that is a combination of lead oxide, and metallic lead. I believe you mentioned that?

A. It is not a combination. It is in the manufacturing of the oxide. There is a certain amount of lead left in, metallic lead.

Q. Would you consider that product a pigment?

A. Well, I do not know just enough about what you mean by pigment to define it. I do not know the definition of that.

Q. You understand, do you not, that it is a product that is made specifically for the battery plates and for no other purpose?

A. It is made specifically for battery plates. Whether it can be used for anything else I do not know.

Q. You do not know that it could be?
A. Well, I would not know. I could not possibly judge that.
Q. You never heard of it being used for any other purpose?
A. I will put it that way, yes.
Q. And it was represented to you as a product especially designed and compounded for use in battery plates?
1862 A. For making a better plate, yes.

Redirect Examination by Mr. Wright.

Q. Mr. Perry, when did you state that you began using this hydro-set method?
A. I believe it was two years ago last September.
Q. Do you know when that process was finally made available to the battery manufacturers?
A. It was made available to the small manufacturer like ourselves at that time.
Q. At that time?
A. Yes. I think they experimented over a period of some years with some other battery manufacturers when they thought it was necessary to control the temperature in the drying and that the amount of heat should, that should be applied to the plates.
Q. Now, prior to the time that this process was made available to you, say in 1941, do you know of any physical differences between the negative oxides offered for sale by National Lead Company and those of Eagle-Picher or Metal Refining Company?
A. As far as I know, red lead is red lead and litharge is litharge.
Q. Now—
A. I will say this now—may I explain this?
1863 Q. Sure.
A. In the negative plate you have to put an expander on; otherwise the oxide would shrink away from your metallic grid, and you get poor contact and you do not get the give-up, so that in the early days we used to put in this expander in our negative plates ourselves. Later, the lead companies developed their own type of expander and you were able to purchase the oxide with the expander in it, to save you that much trouble.

Q. Do you know what that expander material was?

A. Some of it. One of the main ingredients I have been given to understand, is lamp-black. That is a very finely divided carbon.

Q. Now, were similar expander materials introduced into the oxides by the National Lead, Eagle-Picher and Metal Refining?

A. They each developed their own expanders, the proportions of which were probably different.

Q. All for the same purpose, to accomplish the same purpose?

A. Yes.

Q. Other than the expanders, do you know of any differences that might have existed in the batteries? Do you know of any other physical differences that might have existed in oxides of a comparable—

A. One man—

Q. —grid?

1864 A. One man would process a manufacturing, would develop a different shape particle of the oxide. I know in the early days there was quite a bit of difference. One was a flaky type of oxide.

Q. You speak of the early days; what do you mean by that?

A. What?

Q. You speak of the early days; what do you mean by that?

A. Oh, in the days of, I would say, from the time I started in the battery business, 1902, up to in the twenties.

Q. Mr. Perry, you stated I believe on cross-examination, that at the time you began purchasing from National Lead Company that the price made no difference to you, that you were purchasing on the basis of the service and—

A. I do not think I said it made no difference.

Q. Well, if you said—suppose in 1940 or 1941, you had been able to purchase a comparable oxide from Eagle-Picher or Metal Refining, at half a cent per pound lower than that offered to you by National Lead Company, would you have considered giving your business on that basis—

Mr. DuBose: I object to that upon the ground that the word "comparable" is in there. The testimony is that the National Lead Company oxides were different.

Mr. Wright: Well, now, just a minute. I made that specifically back to 1941, and the testimony was that, I

believe, by this witness, that there were no differences
1865 except possibly in the filler compound or expander compound of the oxides, at that time. At least, he knew of no difference.

Trial Examiner Norwood: He may show that this witness' economic reaction would be under those circumstances, I think, show the modifications in the trade and so forth.

Objection overruled.

Mr. Hinds: Read the question again.

Trial Examiner Norwood: Answer the question.

The Witness: Read the question.

Mr. Wright: Read the question.

(The reporter read the question:

"Q. Well, if you said—suppose in 1940 or 1941, you had been able to purchase a comparable oxide from Eagle-Picher or Metal Refining, at half a cent per pound lower than that offered to you by National Lead Company, would you have considered giving your business on that basis—")

Mr. Wood: In rereading the question I want to object on the ground that the word "comparable" makes the question indefinite.

Trial Examiner Norwood: I think he may answer, and you may clarify that.

Mr. Wright: On the contrary, omission of the word "comparable" would have—

1866 Trial Examiner Norwood: You may answer the question.

A. As I told you, we started out to make the best battery we knew how and if we should consider any other manufacturer of oxide, we would conduct some very careful tests.

Trial Examiner Norwood: Well, in case you had conducted those tests and you found that the articles were the same, then you can answer the question with that consideration.

The Witness: Well, I know we certainly would give it consideration. I would contact National and ask: "Why can't we buy lead from you just as cheap as from the other company"?

By Mr. Wright:

Q. In the event National Lead would not sell you as cheap as the other fellow would you have considered switching your business?

A. How could I tell you that now?

Q. Let me ask: Is the price at which you buy oxides an important thing to you?

A. A small difference would not make much difference.

Q. What do you mean by a small difference?

A. Well, there is about eleven and a half pounds, or say, eleven pounds of oxide in a battery. Say it is a half a cent per pound. That would mean about a nickel a
1867 battery. Now, we do not believe in buying and I have never believed in buying on a price basis. We like the Eagle-Picher Company and I have bought a lot of oxide from them in years gone by, and here is something that would come into play:

When I started in the battery business I was "busted," in 1939. I had six hundred dollars between me and the wolf, so I went to the National Lead Company here in town. I knew them from years gone by, and I said to Mr. Carrol down there: "I am going back in the battery business." He said: "That is fine."

By Mr. Wright:

Q. Mr. Perry, will you answer my question?

A. I am answering it and I will tell you another factor that comes into play because it is not all price or a nickel a battery.

Trial Examiner Norwood: Proceed.

The Witness: I said: "I am going back in the battery business. Now, I have handled hundreds of thousands of dollars in the past and you always got your money. I would like to buy lead from you and pay you fifty per cent of my current account, on the 24, 25th box, and the balance in 30 days." I said that I needed help and how about it? He laughed and he said it was all right. He did not even take it up with the auditor. I said, "I am going to do the same thing with the case manufacturers, and
1868 the same with the separator manufacturers, and that represents 90 per cent of our purchases."

They all agreed to it, very nicely. In fact, the separator man who taught us how to treat separators, said: "Ward, any way you want to pay your bills is okay with me" and when I established my credit relations then I went out and borrowed eight thousand dollars to get started in the battery business.

Now, when a fellow plays ball with you like that, you do

not let a nickel a battery stand in your way. I would not. That is not the way I do business. It is not price.

By Mr. Wright:

Q. Now, Mr. Perry, back in that period that you spoke of, I believe you said you ran in the red up until July of 1940, and then until the end of 1941, you made approximately twelve hundred dollars: Wasn't a nickel a battery on your production over that three year period a pretty important matter to you at that time?

A. Well, it would have made a nickel a battery difference.

Mr. Wright: I have no further questions.

Mr. Hinds: I would like to ask a question.

Recross Examination by Mr. Hinds.

Q. I would like to ask: Would you regard it as 1869 important in comparison with these other factors that led to your dealing with National Lead?

A. I did not think I would let a nickel in the price of a battery stand in my way.

Q. Even under the circumstances?

A. Even today.

Q. Even under the circumstances you have related?

A. That is right.

Mr. Wood: I want to ask one question about the 1939 to early 1940 period, that is, before the new National Lead process came in.

By Mr. Wood:

Q. Was it your understanding over that period of time that the Eagle-Picher and the National Lead battery oxides were identical?

A. I assume they were.

Q. You assumed they were or not?

A. I assumed they were the same.

Q. The same?

A. Yes.

Q. And were the processes the same recommended by the two companies at that time or do you know?

A. I do not know what their processes were. I have never been in Eagle-Picher's plant. I do not know what their processes are.

Q. You do know that Eagle-Picher offers a battery 1870 plate making process, don't you?

A. Yes, I do.

Q. And that National offers one too, that they are competitive?

A. The process?

Q. Yes.

A. One has a different process now than the other.

Q. Well, whether or not the processes are slightly different as to technique, and so on?

A. Well, there was not anything comparable to this situation that has been in existence for the last two years, I don't think.

Q. You did not investigate the Eagle-Picher process back in 1939 or 1940, or their products?

A. No.

Mr. Wood: All right.

By Mr. DuBose:

Q. Mr. Perry, you were interested in making a quality product, the best battery you could?

A. Absolutely, and we still are.

Q. And you also wanted to get the best oxides for that purpose?

A. And as soon as I can get enough leads, I am going to get a better battery and get more money for it. I don't let a darned nickel bother me. That is not the extent 1871 of my worries.

Mr. Wright: Mr. Perry, you received a subpoena requiring your attendance here?

The Witness: Yes.

Mr. Wright: You are not a voluntary witness here?

The Witness: No, I am not.

Mr. DuBose: We will take judicial notice of that.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: You are discharged. Thank you, Mr. Perry.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess for lunch. Be back at two o'clock.

(Whereupon, at 11:40 a. m., a recess was taken until 2:00 p. m. this day.)

1872 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order. Call your witness, Mr. Wright.

Mr. Wright: Mr. Lunkes, will you take the stand.

JOHN W. LUNKES was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Lunkes, will you state your full name and address, please?

A. John W. Lunkes.

Q. And what is your address?

A. 2453 Irving Park Boulevard.

Q. What is your business, Mr. Lunkes?

A. I am in the battery manufacturing business.

Q. What is the name of the firm or concern that you are with?

A. Illinois Battery Company.

Q. Is that the Illinois Battery & Electric Company?

A. Yes, sir.

Q. Is that a corporation?

A. No, individual.

1873 Q. Are you the owner of that business?

A. Yes, sir.

Q. How long have you been engaged in that business, Mr. Lunkes?

A. About 25 years.

Q. At that same address?

A. No, I was located at 2050 Irving Park Boulevard.

Q. You have been located in Chicago, have you, that entire time?

A. That is right.

Q. What is the normal daily output of your business?

A. Well, at the present time, which I think is our highest production, it would be about 60 to 70 batteries a day.

Q. Sixty to seven batteries a day?

A. Yes.

Q. About how many did you produce, say in 1941?
A. Oh, in 1941 somewhere around that number, probably 40 to 50 a day.
Q. What sort of batteries are these that you produce?
A. These are for automobiles.
Q. They are automobile batteries?
A. Starting batteries.
Q. Where do you sell them?
A. To the filling stations and truck people, that is, transportation and trucking concerns.
1874 Q. Do you make any direct retail sales to consumers?
A. That is right.
Q. How many types of automotive batteries do you make?
A. In all the different sizes, is that what you mean?
Q. Yes.
A. And also the number in one particular size?
Q. Yes, if you can give us a rough number.
A. Well, according to the Federal set-up we were making about 18 different sizes. Previous to that we made more.
Q. Now over what market area do you sell your batteries?
A. Well, we have been just in, I dare say, the City of Chicago, until this year.
Q. What is your principal competition that you meet?
A. Well, competition is really controlled between what a man would buy, the same as we are controlled on the materials we buy.
Q. What companies are your principal competitors?
A. In the battery manufacturing?
Q. Yes.
A. Willard, Exide, Auto-Lite.
Q. Are you also in competition with Sears Roebuck?
A. Yes.
Q. And Western Auto Supply?
A. Yes.
Q. Bowers Battery?
1875 A. Yes.
Q. Monark?
A. Monark.
Q. Grant?
A. Grant.
Q. National Battery Company?

A. Yes, sir.
Q. Am Plus?
A. Yes, sir.
Q. Universal?
A. That is right.
Q. Federal?
A. That is right.
Q. In the period from 1936 to 1941, what was your profit margin on storage batteries?
A. Well, we had a period there where they dropped down quite a bit. I would say at one period during that time there was probably a 25% profit.
Q. You mean on your costs or on your selling price?
A. The selling price.
Q. That was as low as it got, was it, in that period?
A. That is right.
Q. At what point in that period did your margin reach that level?
A. I wouldn't want to say exactly. I should have looked. I would say it would run around 1937 or 1936, in there.
1876
Q. Did you, in that period from '36 to '41, make a 13-plate battery?
A. That is right.
Q. Of very low amp.-hour output?
A. Yes. It was around 75 amps., I believe, that sold for $1.95.
Q. That was your selling price?
A. Yes, that was our selling price.
Q. What was your cost of materials in 1941 in producing that battery?
A. I would have liked to have gone through some of those figures, and brought them down here. I really didn't know that you were going to question me on those points. I understood it was just a matter of the material we were purchasing at that time.
Q. Well, if you can state how much the materials cost that went into that battery, that would be satisfactory.
A. Well, here is one from Hammond Lead, and I also brought a bill along showing what we paid for it. This was 11-15-40, and it was 8 cents a pound for the oxides.
Q. What is that paper that you are reading from?
A. That is a paid bill from the Metals Refining Company.

Q. You say this is a paid bill?

A. I believe so, isn't it? That is what I asked for 1877 anyway. Well, it is an invoice.

Q. It is an invoice covering your purchase of oxides from Metals Refining.

A. Yes.

Q. Did you receive the shipment that is noted on there?

A. Yes. This (indicating) is the kind of information that we received from Metals Refining Company; this (indicating) is the way we were quoted. This is what I buy, and being a small user I paid generally a cent higher than shown on that card.

Q. Can you state what your margin of profit was on that battery that you sold for $1.95?

A. Well, we generally based it around 25%. I wouldn't want to say exactly. I would rather go back and give you the exact figures.

Mr. Wright: I would like to ask that this document be marked as Commission's Exhibit 841 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Commission's Exhibit 841 for identification.)

By Mr. Wright:

Q. As I understand you to say, this is an original invoice of the Metals Refining Company covering a shipment of oxides billed to you on November 15, 1940?

A. Yes.

Mr. Wright: Your Honor, I offer Commission's 1878 Exhibit No. 841 for identification in evidence.

Trial Examiner Norwood: Show it to counsel.

(Commission's Exhibit No. 841 for identification was shown to counsel.)

Mr. Hinds: Will you furnish us with a photostat of this?

Mr. Wright: I will furnish you with it as soon as I have an opportunity to have one made.

Mr. Hinds: We have no objection.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Are there any objections to that exhibit? It is received as marked.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 841, was received in evidence.)

By Mr. Wright:

Q. Mr. Lunkes, I note that Commission's Exhibit 841 shows the purchase of 9100 pounds of the oxides. Was that at the so-called card price which was then in effect?

A. Yes.

Q. Did you customarily purchase oxides, in the period from 1936 to 1941, at the less-than-five-ton price?

A. Yes, I believe we did.

1879 Q. Did you ever purchase in carloads?

A. No, sir.

Q. Do you make a standard 15-plate, 100 amp.-hour battery?

A. Yes.

Q. Did you make such a battery in 1940 and 1941?

A. Yes, sir.

Q. Can you state how many pounds of oxides were used in manufacturing that battery?

A. About 10½.

Q. Ten and a half pounds?

A. Yes.

Q. Now it has been testified here that the carload price is between three-quarters and one cent per pound less than the card price for quantities of less than five tons.

A. That is between—

Q. (Interposing.) The carload price and the less-than-five-ton price.

A. No, I would say it was more than the difference of one cent between less-than-five-ton and the five-ton price.

Q. I believe it has been testified that the difference between the five-ton and the less-than-five-ton price is a half cent per pound. Now would a difference in price to you of the materials going into your batteries of 10 or 11 cents a battery affect your ability to compete in a normal competitive time like the period from 1936 to 1941?

1880 A. Yes.

Mr. DuBose: The same objection, if Your Honor please, and I believe there is a further objection to that on the ground that you used the figures 10 or 11 cents. I believe this witness testified that he used only 10 pounds of oxides in a battery, and if that is on the assumption that

there is a half a cent difference, I think it is a little confusing; it is to me.

Mr. Wright: I believe the statement was that there were 10 and a half pounds, that is why I used the figures 10 or 11.

Mr. DuBose: Ten or eleven cents?

Mr. Wright: Yes.

Mr. DuBose: We have that same general objection.

Trial Examiner Norwood: Overruled.

By Mr. Wright:

Q. Do you understand the question?

A. If there be a half a cent difference between the less-than-five-ton and the five-ton—

Mr. Wright: (Interposing.) Will you read the question?

(The reporter read the question and answer as follows:

"Q. I believe it has been testified that the difference between the five-ton and the less-than-five-ton price is a half cent per pound. Now would a difference 1881 in price to you of the materials going into your batteries of 10 or 11 cents a battery affect your ability to compete in a normal competitive time like the period from 1936 to 1941?"

"A. Yes.")

By Mr. Wright:

Q. From what company or companies have you purchased oxides?

A. From the Metals Refining Company and one at Hammond, Indiana, another one at Hammond.

Q. The Hammond Lead Products?

A. Yes, Hammond Lead Products, and Metals Refining Company.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Cross examine.

Cross-Examination by Mr. Hinds.

Q. What is Metrox R M Oxides #2?

A. That is a special brand that they compound themselves, I believe. That is the way they list it.

Q. Is it compounded for use in batteries?

A. That is right.

Q. Does any other company have that same compound, do you know?

A. Yes, Eagle-Picher Lead Company does.

Q. The same thing?

A. They call it by a different name, though.

1882 Q. But it is the same thing?

A. It is the same thing.

Q. How do the prices compare between Metals Refining and Eagle-Picher on that same product?

A. They are the same.

Q. What about Metrox Plumbarge 95 X, what is that?

A. That is lead oxide, also.

Q. Is that a special preparation?

A. No, it is one that goes into a negative plate.

Q. Do you buy the same materials or similar materials from Eagle-Picher as you buy from Metals Refining?

A. I have, but I don't know just how long ago it has been since I bought from them. It is years back.

Q. This invoice is back in 1940. Did you buy the same products from one that you did from the other at that time, or did you buy one from one and one from the other?

A. I am not buying any from either one of those companies now. I am buying from the Hammond Lead Company.

Q. I am talking about 1940.

A. Since 1940 I have been purchasing mine from Hammond Lead Company.

Q. But Commission's Exhibit 841 is dated November 15, 1940, and it is an invoice to you from Metals Refining. Does that refresh your recollection?

A. That is right.

1883 Q. At that time were you also buying the same thing from Eagle Picher?

A. I haven't really checked into the years to find Eagle-Picher's bills. I probably could go through my records and find some.

Q. Didn't you compare prices from various companies before you made your purchases?

A. Oh, yes.

Q. And did you buy entirely on the basis of price?

A. No, I couldn't, because their prices were all the same. I got these cards, and I would call them and they would verify the price on the card, and that was the way I done business.

Q. Did they always charge you the price that was on the card?

A. That is right.

Q. Were your purchases usually in quantities of ten drums or 6 drums or around that, or did you buy in larger quantities?

A. Not at that time. At that time it was up to five ton.

Q. Usually in smaller amounts than five tons?

A. Usually, yes.

Q. How small amounts would you buy?

A. I would say from two to five tons, but never that I actually got to five tons; that is, two to four tons.

Q. When did you start buying from Hammond Lead Products Company?

A. When the Metals Refining Company started
1884 making oxides for the Government they refused our orders.

Q. Was that because you could no longer get the material from Metals Refining?

A. That is right.

1885 Q. How did you find Hammond's prices compared with those of Metals Refining?

A. We found them cheaper.

Q. Do you know whether or not they were lower prior to the time that you started buying from Hammond?

A. I couldn't say.

Q. You don't know?

A. No.

Q. But the fact is that when Metals Refining started selling to the Government and no longer could supply you, you then went to Hammond and found that their prices were lower than those you had been paying to Metals Refining?

A. Yes.

Q. But you don't know whether they had been lower previously?

A. That is right.

Q. Now do you know how much lower the Hammond price was than that of Metals Refining?

A. Now?

Q. No, at the time you started buying from Hammond?

A. A differential of about a penny.

Q. About a cent?

A. About a cent—a half a cent, rather.

Q. Now I notice on this particular invoice, Commission's Exhibit 841, that there was a total of 9100 pounds, which is only 900 pounds short of five tons. Will you

1886 explain why you didn't buy the slight additional amount and get the five-ton rate?

A. Yes. I paid cash on delivery and that is the dough I had to pay for it.

Mr. Hinds: That is all.

Mr. Wood: I have a couple of questions.

Trial Examiner Norwood: Go ahead.

Cross-Examination by Mr. Wood.

Q. Do you do any rebuilding of batteries?

A. Not at the present time. We did at one time.

Q. What was the nature of that business? I mean what is meant by rebuilding a battery?

A. Well, I can tell you what we did to the battery, if that is what you would like to know.

Q. Tell us that.

A. In rebuilding a battery we took out the positive plates and threw them away and put in a new set of positive plates and sent the battery through in the regular course as a new battery.

Q. What about the negative plates?

A. We used the negative plates.

Q. Is it possible to re-use the grids by refilling them with oxides, with paste?

A. I have never tried that, I couldn't say.

1887 Q. What per cent of your batteries would you say were rebuilt batteries?

A. At the present time none.

Q. Back in 1940 and 1941?

A. I don't know, I would say about a third.

Q. Did you at any time have any service from any of the lead producing companies; that is, did you get any advice from them on manufacturing technique or anything of that sort?

A. No. The only information you would get is when their materials didn't work out you could have their man come down and try and show you why, and what was wrong.

Q. And did you ever receive that type of service?

A. No, I don't believe I have.

Q. You didn't require it?

A. No.

Q. But you knew that that type of service was available?

A. Well, yes, I believe they say so. I have never had it.
Q. You didn't ask for it?
A. That is right.
Mr. DuBose: No questions.
Mr. Wright: No further questions.
Trial Examiner Norwood: The witness is excused.
(Witness excused).
Mr. Wright: May we have a five minute recess?
Trial Examiner Norwood: Yes.
(A five minute recess was had).

1888 Trial Examiner Norwood: Proceed, Mr. Wright. Call your next witness.
Mr. Wright: Mr. Kita.

JOSEPH J. KITA was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Kita, will you state your full name, address and occupation?
A. Joseph J. Kita, manager of the Franklin Storage Battery Company at 2901 W. Jackson Boulevard, Chicago, Illinois.
Q. Is that a corporation, Mr. Kita?
A. That is a corporation.
Q. Are you an officer of that corporation?
A. Just the manager, not an officer.
Q. Are you the production manager?
A. Yes, sir.
Q. Are you also the sales manager?
A. Yes, sir.
Q. How long have you been with that company?
A. Ten years.
Q. In that same capacity?

1889 A. Not in the same capacity. I have been in the same capacity for the past four years. I was sales manager prior to that time.

Q. How many batteries a day does Franklin produce in normal times?
A. Fifty.

Q. Fifty batteries a day?
A. Yes.
Q. What type of batteries are those?
A. What types—starting and lighting, commercial, specials, motorcycle; farm light batteries.
Q. Over what market area do you sell those batteries?
A. Coast to coast.
Q. Does that include your automotive batteries?
A. Yes.
Q. Where is the bulk of your business?
A. Local, in the Chicago area.
Q. Do you sell batteries in Chicago?
A. Yes, to a certain extent. We ship a man at Santa Rosa battery plates which are turned into batteries.
Q. I am speaking now only of batteries themselves.
A. To my knowledge we never ship individual batteries to California.
Q. From what company or companies do you purchase lead oxides?
A. National Lead Company.
1890 Q. Has that been exclusively from National over that period?
A. For the past four years, yes.
Q. Prior to that time from whom did the company purchase?
A. Federated Metals; Division Lead, and one more. Who is that outfit down on Campbell Avenue? The Gardiner Metals.
Q. Did you purchase oxides from those companies?
A. No, just metal, antimonial lead. Oxides from the National Lead Company for the past four years.
Q. Prior to the past four years did you purchase oxides from any one other than National?
A. From Federated.
Q. Where is Federated located?
A. In Hammond, I believe.
Q. Is that concern still in business?
A. Oh, sure.
Q. In what quantities did you purchase in the period from 1936 to 1941, that is as to oxides?
A. What do you mean?
Q. Did you purchase in quantities of less than five tons, or what?
A. Drop shipments of five tons were made, but we tried to purchase in carload lots.

Q. Did you purchase in carload lots at carload prices from 1936 to 1941?

1891 A. No.

Q. On what price basis did you purchase during that period?

A. Who knows. I can give you some figures here, I can give you an idea. The National Lead Company in 1941 billed us red lead at $8.75 less one per cent. In 1946 they are billing us at $9.00, $9.75, $10.75 and $11.00. Eleven dollars is the current price I understand.

Q. You said red lead?

A. That is oxide.

Q. Do you mean 95 per cent straight red lead?

A. One hundred per cent straight red lead as far as we are concerned. We are ordering No. 1 Red Lead, which is their best grade. I understand it contains about 93 per cent lead.

Q. Do you know what price you paid for litharge in 1941?

A. $7.75 in 1941. In 1946, $8.00 and $8.75. $9.75 is the current price.

Q. Did you purchase any other oxides at that time?

A. Yes.

Q. What other oxides?

A. One called the 111 Mixture in 1941 at $7.75, and $8.00 in 1946. The 25 R Oxide at $8.00 in 1941 and at $10.00 in 1946. Those prices are per hundred pounds.

Q. Do you make battery plates for other manufacturers?

A. Yes.

Q. Over what period of time have you been in that business?

A. Ever since they started in business in 1915.

1892 Q. Is that business located mainly in Chicago?

A. Oh, no. No, we ship plates practically to all points.

Q. How many customers for plates do you regularly supply in the City of Chicago?

A. At least fifteen regulars.

Q. Do you know whether these companies are large, small, or medium-sized battery companies?

A. They are medium-sized battery companies.

Q. About how many bateries would they produce in a day?

A. I wouldn't know. I don't know their business. I know that some of them buy 200,000 plates a year; others

buy a hundred thousand plates a year. We spread about a million battery plates among those customers every year.

Q. On what price basis do you sell those plates?

A. What price basis?

Q. Yes, sir.

A. The cost of material, labor, overhead, and a small profit.

Q. What percentage of that price is accounted for by the cost of materials?

A. I don't know.

Q. Is it more than half?

A. Oh, no. You figure it out yourself. We were selling a particular type plate here up to June 30th at $71.50 a thousand. The lead content of that plate is approximately 600 pounds per thousand plates. You try to figure
1893 out how much money we are making.

Q. When you say lead, what do you mean?

A. Lead, that means antimonial lead and oxide, by weight, the plate cost is around 600 pounds of material per 1,000 plates. They are selling those plates at $71.50.

Q. Is that at the present time, do you mean?

A. Up to June 30th, and we raised it, with the lead increase that was granted at that time to $83 a thousand.

Trial Examiner Norwood: What does your lead cost you a pound for the 600 pounds?

The Witness: The lead costs a cent a pound or $60, so there was $11.50 in it.

The story behind it is the prices were set for so many years, and our customers wouldn't take a raise, and when the O. P. A. comes in we couldn't do anything.

By Mr. Wright:

Q. What was your price of those plates in 1941?

A. $71.50, and up to June 30, 1946, it was $71.50.

Q. Now, you spoke of six hundred and some odd pounds of lead content per thousand plates.

A. Yes, sir.

Q. How much of that is accounted for by oxides?

A. Fifty per cent of it.

Q. Fifty per cent?

A. Yes.

1894 Q. Now, of the oxide weight, about how much by weight is positive and how much negative?

A. There is no sense to that question. We make a plate which is called a neutral plate. It is our own trade formula.

We sell you a plate and you can do what you please, make it positive or negative.

Q. It requies further processing to make it positive or negative?

A. The plate we make will make either positive or negative with the same material. The other manufacturers use a loaded negative; we don't.

Q. What kind of oxides do you put into that plate?

A. No. 1 battery red lead from National Lead, and special battery litharge.

Q. In what proportions are those put in?

A. That is something I wouldn't want to answer, because that is our little secret. We are making about the best plate in the business today and I don't se why we should pass it on to the other manufacturers.

Q. I was not attempting to go into any trade secrets.

A. We have competitors here, and while they are in the room I don't think the question is fair.

Q. All I am trying to do is find out how important the cost of these materials is to you and what relation it has to your selling price.

1895 A. If we didn't have any batery men here, I wouldn't mind telling you.

Q. May I warn you that this is a public record so that anyone would have access to it. I just wanted to tell you of that.

A. We are a little manufacturer and the reputation we have for making a quality plate seems to keep us in business, where other companies come and go. You have seen the size of our plant. It is very small. We do a nice plate business. You cannot name a large trucking company that does not use the plate in their batteries in this district. One of the largest bus companies uses them exclusively, and they can buy plates elsewhere for less money, but they don't stay put. If I build you a battery it stays five or six years. If you buy something else you buy one every year. That is the difference.

If this doesn't have to go on the record I don't want it on. We buy the powders and mix our ore.

Q. That is perfectly all right.

Now, Mr. Kita, I understood you to state that the finished storage batteries you sell are principally sold in and around Chicago, is that correct?

A. That is right. I could name you a few instances where they go out of town. We made a shipment to South

Carolina a while ago, but it is mostly local here. Some
1896 goes to Elgin. Some goes to dealers that are out of town through agents. We don't know.

Q. What is your principal competition in this area, or what was it in the period from 1936 to 1941?

A. Practically every battery company in Chicago. Price competition, you mean?

Q. Yes.

A. Well, you could name Apex; you could name Commander; you could name Sears-Roebuck Company,—that is Globe Union.

Those fellows sell at a price. We sell our batteries at premium prices, but we have a premium battery.

Q. Do their prices affect the prices that you charge, or did they in that period of 1936 to 1941?

A. Not necessarily, because the man that will buy a ten dollar hat would not go out and buy a three dollar hat. When they buy a quality battery they pay for it.

Q. Did you in that period make a thirteen plate battery?

A. In 1936, no.

Q. Well, anywhere over that period of five years?

A. No.

Q. What was the selling price on the cheapest battery you made?

A. A fifteen plate battery at $7.53 to the dealer.

Q. That was your lowest price at which you sold?

A. Yes.

1897 Q. What was your net profit on a battery like that in, say, 1938 and 1939?

A. Well, in 1938 we didn't make that type of battery.

Q. Well, what was your cheapest battery that you made at that time?

A. In 1938, about $4.50, a fifteen plate battery, which would probably average about 40 cents for us.

Q. That would be your net, 40 cents over your manufacturing cost and overhead?

A. That is right. That is figuring labor at the time was very low. Our labor cost is very high, our labor costs have increased almost three times.

Q. How does that profit margin compare with your present day profit, or your present day profit margin?

A. Today I would say we clear about $1.25 on the $7.50 battery.

Q. In that period you were operating on a much closer margin?

A. Sure. Competition was keen. There were thousands of manufacturers with $2.59 batteries on the street, so the only way you could get into a dealer with no advertising was to come in with a half dozen batteries at $3.39, hoping he would buy some of the better ones later.

Q. You were buying at a five-ton price, I believe you stated, at that time?

1898 A. I believe we were.

Q. Are you aware of what the carload price was at that time?

A. I understand it was half cent a pound less, because I got the lead company to give me that price about two years ago.

Q. How would it have affected your ability to compete if you had been able to purchase it at the carload price in that period?

A. It wouldn't affect it.

Mr. DuBose: The same objection.

Trial Examiner Norwood: Overruled.

The Witness: It wouldn't affect us. I don't see how it would affect us.

By Mr. Wright:

Q. Now, how many pounds of lead oxides do you use in that battery you stated you sold for four dollars and something?

A. About sixteen pounds.

Q. Of oxides or lead?

A. No, oxide and lead.

Q. Half of that would be oxide?

A. That is right.

Q. A half cent a pound would have been four cents on that battery?

A. That is right. It wouldn't have made much difference. It was just a drop in the bucket.

1899 Q. How would it affect your business of manufacturing and selling plates?

A. Well, in a year's time it would make a lot of difference.

Q. Would it make considerable difference in your overall operations?

A. So far as cost is concerned?

Q. So far as cost and profits?

A. Well, it would make a difference so far as profits,

because the operations are the same, whether we pay one price or another, but if we can buy it for less then we make more money.

You see, plates are a funny business. We are individual in that line. We sell a plate to a small manufacturer and that man has to take the cost into consideration, because he buys the plate and he has to supply the rest of the material himself and build the battery. When he builds that battery he is building it for the competitive market, and if the plate cost is too high he just can't come in, so our assemblers are in the business because we sold them plates pretty close to cost. In fact, some of them were below cost.

We are a little outfit, we have no expert accountants, or these guys that are specialists. We just make them and sell them, as the saying goes. You can never set a cost in a small shop because you have not got such a thing as piece workers. You have a man you pay $1.25 an hour for, 1900 and if he doesn't feel right to doesn't do anything.

If you fire him you have not got the man and you cannot replace him.

At the present time we have got six men over there, and if I fire one I break up the whole combination, so even though he doesn't do anything sometimes for a day, you just don't fire him. You hope he feels better and that he will produce the next day.

I will show you what that really means. I have tried putting a man on piece work, a good battery man that has been with us for about four or five years, on a piece work basis, and he produced ninety-eight storage batteries in forty hours, completely finished, ready for sale. That same man working by the day will make twenty or thirty in forty-eight hours. Now, you figure it out.

Q. Does it require much capital or equipment to get into the battery business in a small way?

A. No. Right now I would say for ten thousand dollars you could have a nice shop,—a nice shop.

Mr. Wright: I have no further questions.

Trial Examiner Norwood: Gentlemen, do you have any questions?

Mr. DuBose: No cross.

Mr. Hinds: No cross.

Trial Examiner Norwood: Thank you, Mr. Kita.

(Witness excused.)

1901 (Discussion off the record.)

Trial Examiner Norwood: We are ready for your statement about your evidence. Do you have any more witnesses, Mr. Wright?

Mr. Wright: No, sir. I have no more witnesses in Chicago. Two that I thought would be here tomorrow will not be available, so now I would suggest that we adjourn to Kansas City.

Mr. DuBose: Where do we go there?

Mr. Wright: I believe Mr. Norwood has that information.

Trial Examiner Norwood: Do counsel for the respondents have anything further?

(No response.)

Trial Examiner Norwood: Well then, we will adjourn to reconvene in Kansas City, Missouri, Room 527, U. S. Court House, at ten o'clock, Central Standard Time, November 18, 1946.

(Whereupon, at 3:05 o'clock p. m., Thursday, November 14, 1946, the hearing in the above-entitled matter was adjourned to 10:00 o'clock a. m., Monday, November 18, 1946, in Room 527, U. S. Court House, Kansas City, Missouri.)

1902

Room 527, U. S. Court House,
Kansas City, Missouri,
November 18, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1903

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Chicago on November 14, the hearing in Docket No. 5253 is now convened in Kansas City, Missouri, Room 527, U. S. Court House, at 10 o'clock a. m., on November 18, 1946.

The reporter may enter the appearances.

In further explanation of previous rulings in this case and as a matter for our future consideration, I will state for the record that the Trial Examiner will be guided in the reception of evidence at these hearings by the requirements of Section 7, Subsection (c) of the Administrative Procedure Act. This permits of the reception of "any oral or documentary evidence", and requires the exclusion, as a matter of policy, of "irrelevant, immaterial or unduly repetitious evidence". The subsection further provides that no sanctions shall be imposed or rule or order be

issued except as supported by and in accordance with the reliable, probative and substantial evidence.

The measure thus provided for the reception of material is that of value as evidence, and it is clear that it may be received without regard to technical considerations if it does not appear to be irrelevant, immaterial or unduly repetitious. And if material is received which is
1904 thereafter shown by additional information or further analysis to be unreliable, non-probative or insubstantial, the same shall be disregarded and cannot be taken as the basis for any part of the Trial Examiner's recommendations or for any order of the Commission.

These measures should and will be applied with due regard for fairness as affected by the nature of the evidence and the circumstances of its production, proffer and receipt.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Fred Florence.

FRED FLORENCE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Florence, will you state your full name and address for the record, your business address, that is?

A. My name is Fred Florence, and my business address is 1615 Oak Street, Kansas City, Missouri.

Q. What is that business?

A. Automotive electric service and repair busi-
1905 ness, and battery manufacturing.

Q. Under what name is it carried on?

A. Automotive electric, Becker-Florence Electric Company.

Q. Is that a corporation?

A. A partnership.

Q. Are you a partner in that business?

A. That is right.

Q. Over how long a period of time has that business included the manufacture of batteries?

A. Since 1931.
Q. What type of batteries are manufactured there?
A. Automotive batteries exclusively.
Q. They are all replacement batteries, are they?
A. That is right, replacement batteries.
Q. Approximately what is your average daily output of batteries normally, in normal times?
A. In normal times, when materials are available, it is 28 a day.
Q. Over what market area are those sold, Mr. Florence?
A. A radius of a hundred miles of Kansas City.
Q. To what type of customer are they sold?
A. Well, I can answer that in two ways. Prior to the war they were sold practically exclusively to trucking concerns.
Q. Do you also sell to retail outlets for resale?
A. Very seldom.
1906 Q. What was your principal competition in this market area in the period from 1936 to 1941, Mr. Florence?
A. The principal competition?
Q. Yes.
A. Well, we had many competitors in the sale of batteries—factory outlets and chain stores and wholesale distributors.
Q. Were you in competition, in this area, with National Battery Company?
A. Naturally.
Q. And Willard and Exide?
A. Naturally.
Q. Auto-Lite?
A. Yes, sir.
Q. Globe-Union?
A. Yes, sir.
Q. Sears Roebuck?
A. Yes, sir.
Q. Western Auto Supply?
A. Yes, sir.
Q. Montgomery Ward?
A. Yes, sir.
Q. Firestone?
A. Yes, sir.
Q. How many different sizes and types of batteries do you make, Mr. Florence?

1907 A. We make five groups, five sizes.

Q. Is that five sizes in each group?

A. No, that is five groups. I beg your pardon, that would be six groups.

Q. About how many types in each group?

A. In the olden days, I mean in the time prior to the war, we made five in Group 1, and two of each of the other groups.

Q. In the period from 1936 to 1941, did you make a 13-plate, low-amp. battery?

A. Yes, we did.

Q. Can you tell me, or do you recall what your selling price of that battery was in 1940 and 1941?

A. I can recall the wholesale price on it? That was $4.95.

Q. Was that the lowest price at which you sold it?

A. That was the lowest price battery we had.

Q. Do you recall what your material and labor costs of producing that battery were?

A. I didn't bring those cost sheets on that, but as near as I can remember the cost was about $3.95 to $3.98.

Q. What do you mean by cost there? Does that include your factory costs?

A. Labor and overhead and materials for the completed unit. We run rent costs and all operative costs of all kinds into that.

Q. Was that battery comparable in uality and per-
1908 formance with other batteries that were being offered in this area?

A. We figured we gave more for that amount of money than the chain stores did in the same price bracket.

Q. In that period, say 1940 to 1941, do you recall what a comparable battery was being offered for by your competition in this area?

A. Not specifically, no, but they had batteries that sold for less money, I would suggest $3.50 or $3.75 on exchange. Their old-battery had a value, a cash value, of around 50 cents, so that made them sell the batteries around $4.00 or $4.25.

Q. What was your profit margin in that period on that 13-plate battery?

A. We tried to keep it around a dollar profit.

Q. Was that a net profit that you are speaking of?

A. No, that was gross profit.

Q. Do you recall what your net would be on that?
A. No, I don't.
Q. In 1940 and 1941?
A. No.
Q. How did your gross margin compare, on that battery, as against the other batteries you made at that time?
A. Well, it was about, I would say, 30 percent less profit than we made on the other types of batteries.
Q. From what companies have you purchased lead 1909 oxides, Mr. Florence?
A. We have purchased some from the Eagle-Picher Lead Company back in the early days of our manufacture of batteries, and in later years we have been purchasing it from the National Lead Company at St. Louis.
Q. Do you recall the times at which you purchased from the Eagle-Picher?
A. No, I really don't. We turned that over to a man that had charge of that department, and he ran it on his own initiative.
Q. I see. Mr. Florence, in the period about which you have been speaking, 1936 to 1941, would a difference in costs to you, a saving I mean, of 10 cents per battery have been important in affecting your competition with other concerns selling batteries in this area?
Mr. DuBose: The same objection, if Your Honor please.
Trial Examiner Norwood: Overruled.
A. Naturally. We were working on very small profits and a very small output, and every dollar would have been of value to us.
Mr. Wright: No further questions.
Trial Examiner Norwood: What would your average profit be on those batteries?
The Witness: The average profit on the general line, or just that one?
1910 Trial Examiner Norwood: That one, the one you are speaking of.
The Witness: The better quality batteries?
Trial Examiner Norwood: Yes.
The Witness: We tried to make a 30 or 50 percent gross profit or 33⅓ net profit on everything we sold.
Trial Examiner Norwood: Cross-examination.
Mr. DuBose: No cross-examination.

Trial Examiner Norwood: Does anyone else have any questions?

(No response.)

Trial Examiner Norwood: Thank you, Mr. Florence.

(Witness excused.)

Trial Examiner Norwood: Call your next witness, Mr. Wright.

Mr. Wright: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, we had two other witnesses that we intended to call here, but due to unforeseen developments they will not be available, so we have no further witnesses to offer at this time, and I suggest that we adjourn to St. Louis to convene there at 10 o'clock tomorrow morning.

Trial Examiner Norwood: Is there any objection 1911 from counsel?

Mr. DuBose: No, sir.

Trial Examiner Norwood: The hearing stands adjourned to reconvene tomorrow morning, November 19, 1946, at 10 o'clock, in Room 313, Federal Building, St. Louis, Missouri.

(Whereupon, at 10:30 a. m., November 18, 1946, the hearing in the above-entitled matter was adjourned to St. Louis, Missouri, at 10:00 a. m., November 19, 1946.)

1912

Room 313, Federal Building,
St. Louis, Missouri,
November 19, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815 - 15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1913

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on November 18, 1946, in Kansas City, Missouri, the hearing in Docket 5253 is now convened at 10 o'clock a.m. on November 19, 1946, in Room 313, Federal Building, St. Louis, Missouri.

The reporter will please enter the appearances of counsel present.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Rhoades, will you take the stand?

W. C. RHOADES was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you please state your full name for the reporter?

A. W. C. Rhoades.

Q. Mr. Rhoades, will you state your business address and occupation?

A. It is located at 4818 Fyler Avenue, St. Louis.

Q. What business are you engaged in?

A. Battery manufacturing.

Q. Under what name is that business operated?

1914 A. Shur Start Battery Company.

Q. Is that a corporation?

A. Yes, sir.

Q. What is your position with the corporation?

A. President.

Q. How long have you been President of the company?

A. Since December 20th of last year.

Q. Were you with the company prior to that time?

A. Yes, sir.

Q. For how long a period?

A. Twelve years.

Q. And in what capacity were you employed?

A. Shop manager.

Q. Just what batteries is your company engaged in manufacturing, Mr. Rhoades?

A. Mostly all replacement batteries for automobiles and trucks.

Q. What is the capacity of your plant?

A. At the present time it is about 35 a day.

Q. Thirty-five a day?

A. That is right.

Q. What was it back in 1940?

A. It was about 75 a day.

Q. Now is the operation at St. Louis the only manufacturing operation of Shur Start?

1915 A. That is right.

Q. Was there any connection between that company and the Shur Start Battery Company of Chicago?

A. None whatever.

Q. In what market areas do you sell your batteries?

A. In the State of Missouri and some parts of Illinois.

Q. Where are the bulk of them sold?

A. In St. Louis.

Q. In the St. Louis area?

A. Yes.

Q. To what type of customer do you sell?

A. Service stations and trucking companies.

Q. Do the service stations resell those batteries?

A. Yes, they do.

Q. The trucking companies use them themselves?

A. Correct, yes.

Q. In what quantities does your company purchase oxides and litharge, red lead?

A. Well, it has never been over five or ten tons at any one time. At the present time we are only allotted a certain amount from the Government, which never runs over 3 tons.

Q. From what companies have you purchased these materials in the past?

A. In the past, this past year, it has been the Hammond Lead Company.

1916 Q. Prior to that, from what companies did you purchase?

A. Back in '38 and '37, it was National Lead and Eagle-Picher.

Q. Mr. Rhoades, what competition did you meet in the sale of batteries in your market area in the period of time from 1936 to 1941?

Mr. Welch: Objection. It is shown that this gentleman was the Shop Manager, and not that he knows anything about the selling end of it, which would naturally be that governing the competition angle.

Trial Examiner Norwood: I think he might lay the ground for that.

By Mr. Wright:

Q. Mr. Rhoades, prior to the time you became President of the company, just what were your duties?

A. Well, I had taken care of customers, too, but I was in the front end of the shop most of the time. I did do the selling too, if a customer came to the door, but I never went out to solicit any business.

Q. How many people were employed as officers of the company in that period from 1936 to 1941?

A. There were three.

Q. And how many were employed in the factory?

A. Five to seven. At different periods of the year we had more.

Q. How many employees altogether were there

1917 in ordinary times, then?

A. Well, back in '38 it would run around 8.

Q. Are you familiar with the business of the company in that period of time?

A. Yes, sir, I am.

Mr. Wright: Your Honor, it seems to me that on the basis of these last questions, the objection is not well taken.

Trial Examiner Norwood: The objection was well taken at the time, but I think you have laid the groundwork. You may restate the question.

By Mr. Wright:

Q. Mr. Rhoades, what competition did Shur Start meet in the period from 1936 to 1941 in the St. Louis area?

A. Well, most of the largest competition was out of Chicago.

Q. What companies were those, do you recall?

A. The one that I remember very well was the Commander. That was the name of the battery. I don't know who manufactured it.

Q. Do you recall the names of any others in that category?

A. Federal.

Q. Is that a Chicago concern?

A. I believe so, I am not sure.

Q. Were you in competition at that time with National Battery Company?

A. Not that I can recall.

Q. Willard and Exide?

1918 A. They always have been competition in batteries for us.

Q. Were you in competition with Sears Roebuck and Montgomery Ward?

A. Not to any great amount.

Q. Western Auto Supply?

A. About the same as Sears Roebuck. We ran as close to their price as we possibly could. It was the competitor that we ran our prices by.

Q. What was the competitive situation in the St. Louis market in that period of time?

A. You mean price?

Q. Yes, sir.

A. Well, on a 13-plate battery at that time it was around $5.10.

Q. Was that the wholesale price?

A. Retail price.

Q. Was that your retail price?

A. Ours was $5.45.

Q. $5.45?

A. That is right.

Q. What company quoted the $5.10 price, do you recall?
A. I think that was J&R and Western Auto.
Q. Now the battery that you spoke of, the $5.45 battery, was that a 13-plate battery?
A. Yes.
1919 Q. Do you recall what your margin of profit was on that battery in that period of time?
A. It was very small. I can't recall in dollars and cents what it was.
Q. Was your margin in that period generally smaller than it is today?
A. Yes, it was.
Q. Do you know the Acme Battery Manufacturing Company of 2007 South 7th Street, St. Louis?
A. Yes.
Q. Is that a large or a small battery concern?
A. I believe it is about the same size as we are.
Q. Do you know the market area in which they sell?
A. No, I couldn't say. I believe it is in St. Louis—
Mr. DuBose (Interposing.) I object to what he might believe, not of his personal knowledge. He said he didn't know but he "believed". I move to strike out the answer beginning with the words "I believe".
Trial Examiner Norwood: Read the question and answer.
(The reporter read the question and answer.)
Mr. Wright: I submit I should be able to examine him about the basis for his belief.
Trial Examiner Norwood: Well, you may do that.

By Mr. Wright:

Q. Have you encountered the Acme Battery Manu-
1920 facturing Company as a competitor in the St. Louis area?
A. No.
Q. Do you know the Power Plus Battery & Supply Company, 4928 Natural Bridge, St. Louis?
A. Yes.
Q. Are they competitors of yours in this St. Louis area?
A. Yes, they are.
Q. Do they sell the same type of battery that you do, generally?
A. In the general run, I would say yes.
Q. Mr. Rhoades, would a saving to you of from 5 to 10 cents per battery in material costs during the competitive

period, say from 1936 to 1941, be of importance to you in your ability to compete in the battery business?

Mr. Welch: Objection. Your Honor, this question is directed to a witness who does not buy lead from any of the respondents in this proceeding, and I don't believe that a Federal Trade Commission order can have any effect on this man's price that he is paying to some producer who is not a defendant in this lawsuit.

Mr. DuBose: I also want to state my objection along the general lines that I have had to all this type of testimony, with the added objection in connection with this gentleman upon the ground that he was a shop manager in the manufacturing end, and didn't go out to sell,

1921 and wouldn't be familiar with the business.

Trial Examiner Norwood: I think that he has shown that this knowledge came to him in the due course of business. He didn't say so in so many words, but you may cross-examine, and if he didn't, I will strike it.

Mr. DuBose: Mr. Welch's objection, too, is on the ground that this concern purchases its material from the Hammond Lead Company.

Mr. Wright: The witness has already testified that the witness has in the past, within the period of time covered by this complaint, purchased both from the Eagle-Picher and National Lead.

Mr. DuBose: I believe he said during 1937 and 1938.

Trial Examiner Norwood: I think in this testimony to show effects of these prices, it isn't important that he should have bought from one of the respondents. He is attempting to get some evidence here on the competitive situation generally.

Mr. Wright: Your Honor, I would like to direct your attention to the fact that Commission's Exhibit 840-Z-109, which is already admitted into evidence, shows a purchase by the Shur Start Battery Company of St. Louis, Missouri, on September 26, 1941, of 10,200 pounds of litharge from the Eagle-Picher Company.

Mr. DuBose: Then I renew my objection upon

1922 the ground that this gentleman, by his previous testimony, has shown that obviously he doesn't know from whom he has been purchasing lead, and is in no position to give this testimony required by the question.

Mr. Wright: Your Honor, as I recall the witness' testimony, it was that the company is now purchasing from the

Hammond Lead Company. Prior to that time, and he mentioned specifically 1937 and 1938 but didn't restrict it to those times, he said they had purchased from the Eagle-Picher and the National Lead Company.

Trial Examiner Norwood: Read the pending question.

(The reporter read the question as follows:

"Q. Mr. Rhoades, would a saving to you of from 5 to 10 cents per battery in material costs during the competitive period, say, from 1936 to 1941, be of importance to you in your ability to compete in the battery business?")

Trial Examiner Norwood: Can you answer that from your own knowledge and business experience?

Trial Examiner Norwood: (Interposing.) I asked you if you can answer that from your own knowledge and business experience.

The Witness: Yes, I can.

Trial Examiner Norwood: The objections are over-1923 ruled, and you may answer the original question.

A. We figure anything from 2 cents to 10 cents is a great saving on batteries.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: Thank you, Mr. Rhoades.

(Witness excused.)

Mr. Wright: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 11 o'clock, gentlemen, for the reason that the next witness is subpoenaed to appear at 11 o'clock.

(Short recess.)

Trial Examiner Norwood: The hearing will come to order.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Eagan.

PATRICK JOSEPH EAGAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

1924 *Direct Examination by Mr. Wright.*

Q. Mr. Eagan, will you state your full name and address?

A. Patrick Joseph Eagan, 4474 Chippewa.

Q. What is your occupation, Mr. Eagan?

A. I run a battery manufacturing place.

Q. Under what name?

A. Sidney Battery Company.

Q. Is it located at that address on Chippewa Street?

A. Yes, sir.

Q. Is that a corporation?

A. No, it is just my place, I call it a company. My brother used to be in with me, although he works for me yet, today.

Q. You operate the business yourself?

A. Yes, sir.

Q. Did I understand you to say you manufactured storage batteries?

A. Yes, sir.

Q. About how many batteries do you produce per day?

A. Well, right now about 60 or 70, something like that.

Q. What is the capacity of your plant, how many can you produce?

A. About 135 a day.

Q. How long have you been engaged in that business, Mr. Eagan?

A. Well, I have been in the battery business since 1925 1922. I originally started being a distributor for Willard, a retailer, then for Exide batteries, and then competition got so bad that later on I couldn't make a living so I had to start manufacturing my own batteries.

Q. When was that that you started manufacturing?

A. I think around 12 or 15 years ago.

Q. Were you manufacturing batteries completely in your shop?

A. Yes, sir.

Q. Did you manufacture the plates, also?

A. Yes, I made the plates and pasted them by hand,

and charged the batteries and everything, there at the plant.

Q. In what area do you sell your batteries, Mr. Eagan?

A. Well, just in the City up until 1945.

Q. In the City of St. Louis, that is?

A. Yes, sir.

Q. To what class of customers do you sell?

A. Well, I originally sold mostly retail and to a few fleet owners, trucking companies, but mostly retail up until 1945.

Q. You had no jobber accounts or wholesalers up to that time?

A. No, sir.

Q. Did you advertise?

A. No, I never did.

Q. Did you have salesmen?

A. No, sir, I used to go out myself half a day, 1926 and then work half a day, go out in the mornings and work in the afternoons.

Q. That is, work in the production of batteries?

A. Yes, sir.

Q. Now at the time you started your business, in what quantities did you buy lead oxides?

A. Well, when we just started, we were buying one barrel of litharge and making the negative plate, and also the positive plate, too, out of that, by mixing a small quantity of red lead; in fact I would have to have two barrels to start with.

Q. Over how long a period of time did you purchase in quantities of one or two barrels?

A. Well, I don't know for sure, but I guess it was maybe a year or two, something like that.

Q. In what quantities did you later purchase after that time?

A. Five-ton lots.

Q. From what companies have you purchased oxides?

A. National Lead Company.

Q. Mr. Eagan, what was the competitive situation in the storage battery business in the period from 1936 to 1941 in St. Louis?

A. Well, it was so bad that the only way we could get by and make a living was to use the old battery cases over again, the old rubber cases, and put new plates in there. Most of our batteries were like that, but there

1927 were some all new, but not all of them. The biggest majority of our business was used cases with new plates in them. The rubber cases, you see, don't wear out, and we could use them over again. In that way there was a saving of about 45 or 50 cents on each battery, and it didn't affect the use of the battery or the service of it.

Q. Now was that saving of real importance to you in competing in that period of time?

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Objection overruled.

A. Oh, yes, it was.

By Mr. Wright:

Q. What companies were your principal competition in that period of time, Mr. Eagan?

A. Well, at that time Grant Storage Battery, and for a while I think Majestic and Monark, who were in Chicago. Both those companies were in and out at different times. I think they were the same company, only they had a reorganization and changed names.

Q. Where were they located then?

A. I think they were in Chicago.

Q. Were you in competition at that time with Sears Roebuck and Montgomery Ward?

A. Well, when Sears came in that ruined us com-
1928 pletely. We went completely broke and lost everything we had.

Q. When was that, if you recall?

A. Well, I think it was about 13 or 14 years ago.

Q. That would make it 1933 or thereabouts?

A. Something like that.

Q. You say that ruined you and you went out of business?

A. Yes, sir.

Q. You later resumed business, did you?

A. Yes, they took the building away from us, and we moved out to where we are now. We were at 2600 South 7th Street at that time, and we had that building partly paid for, and we lost the whole thing.

Q. Were you able, in that period of time from 1933 to 1943, to offer comparable batteries for sale at prices as low as those offered by the Sears Roebuck?

A. Oh, no; no, sir, we couldn't.

Q. Mr. Eagan, do you know of the Acme Battery Manu-

facturing Company at 2007 South 7th Street here in St. Louis?

A. Yes, sir, I know him personally, a good many years. I have been in his place once or twice, but it has been 10 years or more since I have been in there.

Q. Does that concern manufacture storage batteries here in St. Louis?

A. He does, I understand.

Q. Is he in competition in the same line as you?

1929 A. Yes, sir.

Q. How about the Power Plus Battery & Supply Company of 4928 Natural Bridge?

A. They make batteries too, they are a competitor.

Q. In this same line?

A. Yes, sir.

Mr. Wright: I have no further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No cross-examination.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Mr. Wright: Your Honor, I have no further witnesses until 2 o'clock this afternoon, so I suggest that we adjourn until that time.

Trial Examiner Norwood: Is that satisfactory to you gentlemen?

Mr. DuBose: Yes, sir.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 11:15 a.m., a recess was taken until 2:00 p.m. this day.)

1930 Afternoon Session

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Are you ready to proceed, gentlemen?

Mr. Wright: Your Honor, the witnesses that were scheduled for this afternoon cannot be produced, and I suggest we recess over to the hearing scheduled at Nashville on the 21st of November.

Trial Examiner Norwood: Did you issue a subpoena for these witnesses?

Mr. Wright: For one of them, and I am advised by his secretary that the man had left St. Louis prior to the time the subpoena came to the office, and that it has never been served on him, but I have had no opportunity of ascertaining whether or not those facts are true and correct at this time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

In view of counsel's statement, the hearing in St. Louis is now adjourned to reconvene in Room 245, U. S. Court House, Nashville, Tennessee, at 10 o'clock a.m. Central Standard Time, November 21, 1946.

(Whereupon, at 2:03 p.m., November 19, 1946, the
1931 hearing in the above-entitled matter was adjourned, to reconvene at 10:00 a.m., November 21, 1946.)

1932 Room 245, U. S. Court House,
Nashville, Tennessee,
November 21, 1946.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1933 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in St. Louis, Missouri, on the 19th of November, 1946, the hearing in Docket 5253 is now convened in Room 245, U. S. Court House, Nashville, Tennessee, at 10 o'clock a. m., November 21, 1946.

Please note the appearances of counsel present, Mr. Reporter.

Call your witness, Mr. Wright.

Mr. Wright: Mr. Taylor, will you take the stand?

GILP WASHINGTON TAYLOR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Will you state your name, Mr. Taylor?
A. Gilp Washington Taylor.
Q. What is your occupation, Mr. Taylor?
A. Battery manufacturer.
Q. With what company?
A. American Battery Company.
Q. Where is that located?
A. 1520 McGavock Street, Nashville, Tennessee.
Q. Mr. Taylor, did you receive a subpoena re-
1934 quiring your attendance at this hearing?
A. Yes, sir, I did.
Q. You are not a volunteer witness, then?
A. No, sir.
Q. Just what products does the American Battery Company produce, Mr. Taylor?
A. We produce all the lead parts that go into a battery, a storage battery.
Q. Do you produce finished storage batteries?
A. Yes, sir.
Q. You manufacture them in their entirety?
A. Yes, sir.
Q. What is your position with the company, Mr. Taylor?
A. I don't know. I work from one end of the shop to the other, you might say, and do the buying—
Q. (Interposing.) Is that a corporation?
A. No, sir.
Q. Is it an individual—
A. (Interposing.) It is a partnership, my wife and myself.
Q. Your wife and yourself are the only partners in the business?
A. That is right.
Q. How long have you been engaged in that business, Mr. Taylor?
A. I have been engaged since 1935 with the Ameri-
1935 can Battery Company.

Q. Prior to that time what was your occupation?
A. I was with the Hester Battery Company.
Q. Where is that company located?
A. That company was located at that time at 301 Second Avenue South. They have moved since then, and I don't know their address.
Q. Is that in Nashville?
A. Yes.
Q. For how long a time have you been in the battery business?
A. Since 1922.
Q. All that time here in Nashville?
A. Yes, sir.
Q. What is the normal daily battery production of American Battery Company in normal times when you can secure sufficient materials?
A. The normal daily production, I would say, is approximately 100 batteries per day.
Q. Would that be your normal production in 1941, say?
A. In 1941 it wouldn't be, because I was building and moving from another address, which cut my production considerably. I would say in 1941 probably the average production would be 75 batteries a day.
Q. Just what type of batteries are these that are produced by you?
1936 A. Mostly SLI type batteries.
Q. Is that starting-lighting-ignition?
A. That is right.
Q. Are those automotive batteries?
A. Yes, sir.
Q. Approximately how many different sizes and types do you manufacture?
A. Twenty-six.
Q. Twenty-six?
A. Yes.
Q. What is your normal market area for these batteries?
A. We cover approximately 200 miles in any direction —East, West, North and South.
Q. About how far North do you go?
A. We go as far as Evansville, Indiana.
Q. How far South?
A. Birmingham.
Q. Do you go as far as Memphis on the West?

A. We stop off just before Memphis. I couldn't say exactly how far, but I would say Jackson, Tennessee.

Q. How far East do you go?

A. As far as Knoxville.

Q. Do you travel salesmen in that area?

A. Yes, I travel truck salesmen. They deliver and sell off the truck.

1937 Q. To what class of customers do you sell, generally?

A. Garages and filling stations.

Q. Do you have any accounts for jobbers or distributors?

A. No, sir, we don't have a jobber set-up.

Q. Then all your customers resell directly to the public?

A. That is right.

Q. Do you deliver all your batteries to your customers?

A. Not all of them. We ship some.

Q. How are those shipments made?

A. Mostly by truck, by common carriers.

Q. About what proportion of your business, roughly, is handled by common carriers?

A. Approximately 10 percent.

Q. As to the remainder, you deliver in your own truck?

A. That is right.

Q. Who are your principal competitors in this market area you have described, in normal times?

A. In normal times, our competitors mostly are chain hookups, such as oil companies that have their own stations, operate their own stations and require their dealers to handle their products.

Q. Can you—

A. (Interposing.) Such as Gulf Refining Company, Standard Oil Company, and people of that type.

Q. Do you know who makes the batteries that Gulf handles?

1938 Mr. DuBose: I object to that on the ground that it will be purely hearsay.

Trial Examiner Norwood: He asked him if he knew that. He can say whether he knows or does not.

Just answer that "yes" or "no".

A. Well, I wouldn't want to answer that question, because I really don't know for sure. I have my ideas about who makes them, but I wouldn't want to say that I knew.

By Mr. Wright:

Q. What are your ideas based on?

Trial Examiner Norwood: Did you receive information from salesmen or anybody in connection, direct connection, with your business in the due course of same? Did you receive any information on this point in that manner?

The Witness: You mean as to the manufacturer that manufactures the batteries?

Trial Examiner Norwood: Yes.

The Witness: Well, from the dealers. They tell me who makes their batteries, but I don't know for sure that they are the ones.

Trial Examiner Norwood: Well, you can tell us what they have told you.

Mr. DuBose: If Your Honor please, that would be exactly hearsay, what someone told him, not of his own knowledge.

1939 Mr. Wright: He stated that it was from dealers in the course of his business, and it is obviously information which was gathered in the regular course of his business, and I submit—

Mr. DuBose: (Interposing.) I submit that under Section 7(c) of the New Administrative Procedure Act, it is purely hearsay.

Trial Examiner Norwood: Under the strict rules applied in jury trials, information may be given by anyone where that information comes to him in the due course of his business.

Mr. DuBose: Not under my understanding of it.

Mr. Welch: May I make an observation? I think there is probably a slight misconception of the use of the word "dealer". I think the witness, in referring to information coming to him from dealers, was referring to information coming to him from dealers of these big hook-ups who were required to handle the batteries furnished to them by their suppliers of gasoline and tires and other accessories, and not dealers with whom this witness was having any business relationship. I think that is probably something that has confused our thinking, and I think that under no procedure can a man who has a conversation with a man with whom he has no business relationship, relate something that has been told to that first man by somebody with
1940 whom he was not dealing in business. I think it is entirely too remote.

Trial Examiner Norwood: I think the counsel is right about that.

Mr. Wright: I will agree with counsel to this extent, that I believe we should have further questions regarding exactly how this information was ascertained.

I wish to further examine the witness on this point before Your Honor makes any ruling on it.

Trial Examiner Norwood: If you will examine him to have him give us the information that comes to him in the due course of business.

By Mr. Wright:

Q. We are referring now, Mr. Taylor, to Gulf. Have you ever been advised by any dealer as to what battery companies supply Gulf with their batteries?

Mr. Welch: Objection. I think there should be a qualification, when he uses the word "dealer", whether he means a dealer with whom this witness is dealing, or a dealer operating for Gulf to whom this witness does not sell.

Mr. Wright: The question went solely to whether this witness had any knowledge in his mind. If he has such knowledge, then he could be examined further, and—

Trial Examiner Norwood: (Interposing.) Read the question.

(The reporter read the question as follows:

1941 "Q. We are referring now, Mr. Taylor, to Gulf. Have you ever been advised by any dealer as to what battery companies supply Gulf with their batteries?")

Trial Examiner Norwood: When you use the words "any dealer", if it is any of his dealers—this man sells wholesale, doesn't he?

Mr. Wright: If the witness has no knowledge of any sort, it is useless to examine him further. I am trying to ascertain now if he has such knowledge. If he does have such knowledge, then I intend to ask him further.

Trial Examiner Norwood: I overrule the objection; and answer that question, whether or not you have such knowledge.

A. I don't have any direct knowledge.

By Mr. Wright:

Q. Do you have any knowledge?

A. No, I will say no.

Q. With reference to the batteries handled by the

Standard Oil Company, do you have any knowledge from any dealer as to the supplier of batteries to Standard Oil?

Mr. DuBose: The same objection.

Trial Examiner Norwood: I think that "any dealer"—I wish you would make it clear, if he does give us this information, that it is information that comes to him in the due course of his business in his contact with the
1942 dealers to whom he sells or through reports of his salesmen, and things like that. But I think it should appear clearly before this information is received.

Mr. Wright: I have no knowledge that this witness has any knowledge of that sort. I am trying to ascertain that. First of all, I want to establish whether he has such knowledge, on a question requiring a "yes" or "no" answer.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. With reference to the batteries handled by the Standard Oil Company, do you have any knowledge from any dealer as to the supplier of batteries to Standard Oil?")

Trial Examiner Norwood: Answer that question "yes" or "no", whether you have such knowledge or not.

A. Yes, I have been told—

By Mr. Wright:

Q. (Interposing.) Now will you state—

Trial Examiner Norwood: (Interposing.) Who told you?

Mr. Welch: Mr. Examiner, may I request that the Examiner at this time interpose a question to the witness that I think may solve some of our problems, and that is as to whether any of these people from whom he has secured any of this information purchase from any of these large suppliers and from this witness.

1943 Mr. Wright: Now, Mr. Welch, I am examining this witness, and I believe I should be permitted to conduct the examination.

Trial Examiner Norwood: You may go into that on cross-examination.

Mr. Welch: I think that is a vital question that has to be answered before any testimony can be given on this subject.

Mr. Wright: The next few questions will clear this whole matter up beyond the objection of any counsel.

By Mr. Wright:

Q. Will you state from whom such knowledge was obtained by you, Mr. Taylor?

A. Ottenville Tire Company.

Q. Have you ever had business relations with the Ottenville Tire Company?

A. Just a little, not too much.

Q. Have you sold them batteries?

A. A few.

Q. Have you solicited their business in the sale of batteries?

A. No, sir, I haven't. The only dealings I had with them is that he wanted to buy a few batteries from me lately, and I just more or less tried to favor him by letting him have a few batteries, and asked him a question if there
1944 was a possibility of me selling him after the battery shortage was over, and he advised me that he was handling a nationally known battery and that he couldn't buy batteries from me when he could get materials or batteries from the Standard Oil Company.

Mr. Welch: I move that the answer be stricken as not responsive.

Mr. DuBose: Also, I move to strike the answer on the ground that it is purely hearsay.

Mr. Wright: Your Honor, the answer itself establishes the circumstances under which this information was obtained, and that it was obtained in the course of business dealings between Mr. Taylor and the Ottenville Tire Company, and certainly that answer establishes this whole line of testimony to be within the well-recognized exception to the hearsay rule.

Trial Examiner Norwood: Let's have the question and answer read.

(The reporter read the question and answer as follows:

"Q. Have you solicited their business in the sale of batteries?

"A. No, sir, I haven't. The only dealings I had with them is that he wanted to buy a few batteries from me lately, and I just more or less tried to favor him by letting him have a few batteries, and asked him a question if there was a possibility of me selling him after
1945 the battery shortage was over, and he advised me that he was handling a nationally known battery and that he couldn't buy batteries from me when he could get materials or batteries from the Standard Oil Company.")

Mr. Welch: It is obvious that the entire answer after the words "No, sir, I haven't" should be stricken.

Mr. Wright: The part of that answer to which Mr. Welch and Mr. DuBose are objecting is responsive to the prior question, which I don't believe the witness understood. I asked him if he had solicited this company's business, and the latter part of the answer which is now objected to makes it plain that he did solicit business.

Trial Examiner Norwood: Gentlemen, I think that it is just in the interest of time here—there has been a good deal of argument and discussion—that this question be allowed to stand, and the answer. Several questions have borne on the subject, and the witness has clarified the entire situation. So I will overrule the objections, or rather, deny the motion to strike.

By Mr. Wright:

Q. Mr. Taylor, is Ottenville a Standard dealer?

A. A Standard Oil Company dealer.

Q. Did he advise you that he was required to buy batteries from Standard Oil?

Mr. Welch: Objection as leading.

1946 Mr. DuBose: I object on the ground that it will be hearsay.

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. In your previous answer you stated that he had to buy nationally known batteries. Will you explain that?

Mr. Welch: I object to the form of the question. He should ask the witness as to what he stated before, rather than tell the witness.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Will you state what Mr. Ottenville said regarding his relations with Standard Oil Company?

Mr. DuBose: I object to that on the ground that it would be purely hearsay under any rule.

By Mr. Wright:

Q. In connection with the purchase from them of batteries?

Mr. DuBose: I beg your pardon if I interrupted your question, but I renew my objection on the same ground.

Trial Examiner Norwood: Objection overruled. Read the question.

(The reporter read the question as follows:

"Q. Will you state what Mr. Ottenville said regarding his relations with Standard Oil Company—in connection with the purchase from them of batteries?")

1947 Trial Examiner Norwood: "From you", you mean.

Mr. Wright: No, "from them", from Standard Oil.

Mr. DuBose: That is the basis of my objection. The question goes to what Ottenville told this witness as to Ottenville's relationship with a third company. If that isn't remote hearsay, then I have been misinformed on the law.

Mr. Wright: Your Honor, it has already been stated that that statement was made to Mr. Taylor in connection with Mr. Taylor's request that he buy batteries from him, and was given as a reason why he couldn't buy batteries from him. I say at this point that there have been objections made to two previous questions on the ground that they were leading. I have now asked the witness a question which requires a narrative answer, and is not leading. Now it is objected to on another ground.

Trial Examiner Norwood: Your statement is rather broad as to what his relations were. Now you may bring out—and this goes back to the Danbury Hatter case—you can bring out from this man the reasons that his customer gave him for not buying from him.

Mr. Wright: That is the sole purpose of this question.

Mr. Welch: Your Honor, that type of situation is not presented here, because the man was not this witness' customer. It isn't a question of where there had been

1948 a buyer-seller relationship existing between the two theretofore which was broken off by reason of some third party, which was the situation in the Danbury Hatter case.

Mr. Wright: This came about concurrently with the competition of the transaction of purchase from this witness.

Trial Examiner Norwood: I think you are correct there. I am going to ask the witness to confine his answer to the reason why he says he will not continue to buy from you. You can tell us that, but any other details about his relations with the people from whom he buys are not to be made a part of the record.

Mr. DuBose: I have the same objection.

Trial Examiner Norwood: I will overrule the objection, and if the witness doesn't confine himself to that subject I will entertain a motion to strike the answer.

A. The reason that he gave me for not buying in the

future from me was that he had a Standard Oil hook-up or contract that wouldn't permit him to purchase batteries from me.

Mr. Welch: I move that the answer be stricken. I can't conceive that even under the Federal Trade Commission's liberal interpretation, that hearsay can be given as to what the terms of a written contract are.

Trial Examiner Norwood: The motion is denied.

By Mr. Wright:

Q. In connection with this conversation, were you
1949 advised as to the source from which the Standard Oil Company procures its storage batteries?

A. No, sir.

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Did you state previously that you were advised by a dealer as to the source of batteries of the Standard Oil Company?

A. I was advised where he purchased his batteries from, the Standard Oil Company.

Q. But you did not state, then, that you had knowledge of where the Standard Oil Company procured the batteries?

A. I didn't say that. He didn't say who the manufacturer was that made the batteries for the Standard Oil Company.

Q. Are you in competition, over that market area you have described, with Montgomery Ward, and Sears Roebuck, and Western Auto Supply?

Mr. Welch: I object to that as leading. Ask him who his competitors are.

Trial Examiner Norwood: Objection sustained.

By Mr. Wright:

Q. Mr. Taylor, will you state who your other prin-
1950 cipal competitors are in your market area?

A. Well, we have a number of them during normal times.

Q. Well, that is what I am referring to, normal times, say the period from 1936 to 1941.

A. Of course, the larger manufacturers are our greatest competitors, our biggest competitors, because of their hook-ups with the oil companies and the chain stores and places like that, that we can't get into, due to the price situation, we can't manufacture batteries at the price that Montgomery Ward and Sears Roebuck and those people sell them for.

Q. Do you recall any of the prices at which those concerns that you named, offered batteries during the period from 1936 to 1941?

Mr. DuBose: Objection on the ground that it will be purely hearsay.

Trial Examiner Norwood: Read the question.

(The reporter read the pending question.)

Trial Examiner Norwood: Objection overruled.

A. No, sir.

By Mr. Wright:

Q. During that period from 1936 to 1941, what was the price of the batteries, the lowest price at which you offered batteries, Mr. Taylor?

A. I think we sold batteries down as low as possibly $3.75.

Q. That is the dealer price, now?

1951 A. That is right.

Q. At what time did that price occur?

A. I can't say at what time. Batteries were sold from 1932 to possibly 1939 at those prices.

Q. Will you state what battery it was, or what type of battery it was that you offered at that price?

A. We had an off-brand battery we called Amerigo.

Q. How many plates did that battery have, do you recall?

A. Thirteen.

Q. Do you recall what your cost of production was on that battery during that period?

A. The cost was approximately $3.96, I believe. I lost money on the battery.

Q. You lost money on the battery?

A. Yes, it was a strictly competitive battery.

Q. Was that battery sold at as low a price as the batteries offered by your competitors?

A. No, sir, I don't think it was. I think they were cheaper than that.

Q. In other words, there were other batteries on the market at a lower price than that?

A. Yes, a lot of batteries lower than that.

Q. What did you consider in 1938, 1939 and 1940, as your normal net profit per battery?

Mr. Welch: Objection, Your Honor, to the form of the question, what he considered as normal net profit. I think we are entitled to know what it was.

1952

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. What was your profit per battery during 1938, 1939 and 1940, Mr. Taylor?

Q. I don't remember what our profits were, but they were very small.

Q. Did you ever allocate them as to each battery so that you could say how much per battery the profit was during any of those years?

A. No, sir, we didn't have a breakdown like that.

Q. Do you recall what your net profit was in 1938 on the battery end of your business.

A. No, sir, I don't.

Q. During 1939?

A. No, sir, I really can't tell you what my net profit is, because I handle other merchandise along with my batteries, and I don't keep it separate.

Q. From what company or companies do you purchase lead oxides, Mr. Taylor?

A. I have been purchasing lead oxides mostly from National Lead Company.

Q. Over what period of time?

1953

A. Well, since 1935, that is when I purchased the American Battery Company, with the exception of one year when I bought oxide from the Eagle-Picher one year.

Q. In what quantities did you purchase, customarily?

A. Carload lots.

Q. Do you have any invoices showing such transactions with the National Lead Company or the Eagle-Picher Company?

A. I have some invoices. I don't know the dates on them, I just gathered them up, what invoices I had. There are some other papers there that don't belong with those invoices at all. I just picked up the file.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: I would like to ask some preliminary questions on these.

Trial Examiner Norwood: Yes.

Mr. DuBose: Mr. Taylor, did the subpoena that was served on you require you to produce these records?

The Witness: No, sir. I got a letter separate from the subpoena requesting me to bring these records.

Mr. DuBose: But no subpoena was served on you for these records?

The Witness: No, sir.

Mr. DuBose: In addition to the letter, did anyone
1954 from the Federal Trade Commission come around and examine your records?

The Witness: No, sir, they didn't examine my records I don't believe. I got the records out for them, but I don't believe they went over the records. They asked me if I had them, and I had them in my file. The reason they happened to be there was on account of I had taken them down to Atlanta for some over-usage that I had on lead, I carried them down there to let them check my purchases.

Mr. DuBose: How did you happen to produce these particular records here today?

The Witness: You mean why did I bring them?

Mr. DuBose: Yes.

The Witness: On the request of this letter that I got from, I don't know who signed the letter, but it was someone that followed the subpoena up.

Trial Examiner Norwood: Someone from the Federal Trade Commission?

The Witness: Yes, sir.

Mr. DuBose: And are these all the records?

The Witness: Those are all the records for 1945, I am pretty sure.

Mr. DuBose: I object upon the ground that these records concern 1945, after the issuance of the complaint in this action.

1955 Mr. Wright: Before Your Honor rules on this objection, I would like to ask a further question.

By Mr. Wright:

Q. Do you recall whether the letter from the Federal Trade Commission asking you to bring invoices requested invoices for 1945?

A. I am sorry, but I don't remember what the letter

stated any more than it just told me to bring them. I wouldn't say that it said invoices, but it said to bring my information.

Q. Mr. Taylor, do you recall being requested, either in a letter or by a representative of the Federal Trade Commission, to produce invoices showing transactions in the year 1941?

A. Yes, sir.

Q. Were you able to discover any invoices for the year 1941?

A. No, sir, I couldn't find any for 1941.

Mr. Wright: Your Honor, in the first place, counsel's objection is not well taken because the complaint was amended in the spring of 1946, and these invoices relate to transactions which antedate the amended complaint. Furthermore, counsel made every effort to have invoices, for the year 1941, and they were simply not available.

Mr. DuBose: If Your Honor please, I think the testimony in this record has established that there were not normal conditions during the war, and that there are not even normal conditions today due to restricted output 1956 of lead from the mines, and everything else, and I don't think it gives a fair picture of the situation to have these records for 1945.

Mr. Wright: Well—

Mr. DuBose: I don't think they mean anything. All the other invoices, except the recent group of invoices that we delivered in Washington at the last hearing and which have not been introduced into evidence—and we are going to object on that same ground when they are offered—dealt with this so-called normal period 1936 to 1941, and I don't see what value this evidence would be in the record.

Mr. Wright: Your Honor, in that connection, the method of computing prices and the price basis that was in use in 1945, the record shows was in use in 1941 and for a considerable time prior to that.

Mr. DuBose: Without refreshing my recollection from the record, I don't want to accede to that. I won't say he is wrong.

Trial Examiner Norwood: I wouldn't feel justified in excluding evidence of these transactions. You may explain that they were calculated on a different basis, you may cross-examine this witness about that very thing, but to throw a blanket over everything that happened during the war would make us never able to complete any investigation.

I don't think there is a question pending, is there?

Mr. Wright: No, sir. We were off the record with
1957 counsel, and I asked counsel to consider the matter of acceding to the copying of the first four of these invoices into the record. I believe Mr. DuBose made some preliminary examination of the witness before we further discussed that.

Mr. Welch: On behalf of Sherwin-Williams, we certainly would have no objection to the copying in of the invoices rather than their identification as exhibits, in the event Your Honor overrules our objection to these as to competency.

Mr. DuBose: We have no doubt that those are valid invoices.

Trial Examiner Norwood: Mr. Wright can go ahead, then, and make the proper statements, and have those copied into the record.

Mr. Welch: I take it Your Honor has overruled our objections as to the competency of these invoices.

Trial Examiner Norwood: Yes.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will have the witness identify these.

By Mr. Wright:

Q. I hand you herewith four documents, Mr. Taylor. Will you state to me what they are?

1958 A. They are invoices for lead received February 3, 1945—8/600# barrels of red lead and 25/600# barrels of litharge, from the National Lead Company; on February 28, 1945,—13/600# barrels of oxide 25-R and 20/600# barrels of 111-M battery oxide, from the National Lead Company; February 28, 1945—17/600# barrels of 25-R oxide, and 16/600# barrels of 111-M oxide, from the National Lead Company; and on April 17, 1945—30 barrels of 25-R and 35 barrels of 111-M battery oxide, from the National Lead Company.

Mr. Wright: Your Honor, I would like to ask that these four invoices that have been identified by the witness be copied into the record.

Trial Examiner Norwood: The invoices may be copied at this point in the record.

(The invoices are as follows:

National Lead Company
Cincinnati Branch
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio.

Campbell.

Customer's Order No. Invoice Date Feb. 13, 1945
Requisition No. Shipped To

Sold To American Battery Company
1520 McGavock St.
Nashville, Tennessee
Date Shipped 2/3/45

Terms: Net 30 Days Shipped from St. Louis
F.O.B. St. Louis Car No. Via Truck.

1959	Quantity	Description	Weight	Price	Total
8/600#	Bbl.	Barton Battery Red Lead	4800	9.00	432.00
25/600#	Bbls.	Ditto Litharge	15000	8.00	1200.00
			19800		1632.00
		Less Frt. on 20427# at .51 Cwt.		104.18	
		Plus 3% Fed. Frt. Tax		3.13	
					107.31
					1524.69

AA 2X

National Lead Company
Cincinnati, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's Order No.
Requisition No.
Invoice Date Feb. 28, 1945
Shipped To

Sold To American Battery Company
1520-22 McGavock St.
Nashville, Tennessee
Date Shipped 2/26/45

Terms Net 30 Days
Shipped From St. Louis
F.O.B. St. Louis Car No. Via Truck Prepaid & Allowed

Quantity	Description	Weight	Price	Total
13/600#	Woods Bbls. Battery Oxide 25-R	7800	8.25	643.50
20/600#	Wood Bbls. 111-M Battery Oxide	12000	8.00	960.00
		19800		1603.50

Part of Carload Order
AA 2X

1960

National Lead Company
Cincinnati, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's Order No.
Requisition No.

Invoice Date Feb. 28, 1945
Shipped To

Sold To American Battery Company
1520-22 McGavock Street
Nashville, Tennessee

Date Shipped 2/22/45

Terms Net 30 Days
F.O.B. St. Louis Car No.

Shipped From St. Louis
Via Truck Prepaid & Allowed

Quantity	Description	Weight	Price	Total
17/600#	Wood Bbls. Battery Oxide 25-R	10200	8.25	841.50
16/600#	Wood Bbls. Battery 111-M Oxide	9600	8.00	768.00
		19800		1609.50
				1603.50
				3213.50

19 800
19 800
39 600
19 800
59 400

AA 2X

National Lead Company
Cincinnati 3, Ohio
Manufacturers of Dutch Boy Products
641-659 Freeman Avenue
Cincinnati 3, Ohio

Campbell.

Customer's Order No. Invoice Date April 17, 1945

1961 Requisition No. Shipped To

Sold To American Battery Company
1520-22 McGavock St.
Nashville, Tenn.

Date Shipped 4/10/45

Shipped From St. Louis

Terms Net 30 Days

F.O.B. St. Louis Car No. Via Truck

Quantity	Description	Weight	Price	Total
30 Wood Bbls.	Battery Oxide—25-R	18000	8.25	1485.00
35 Wood Bbls.	111-M Battery Oxide	21000	8.00	1680.00
5 Steel Drums	Bartons Battery Litharge	3000	8.00	240.00
		42000		3405.00
	Less Frt. on 43325# at .43 Cwt.		186.30	
	Plus 3% Fed. Frt. Tax		5.59	
				191.89
				3213.11

By Mr. Wright:

Q. Are these invoices records of transactions of purchases of these products by you from the National Lead Company?

A. Yes, sir.

Q. In the year 1941 did you purchase similar products from the National Lead Company on a carload lot basis?

A. I don't think I purchased the same kind of oxide at that time. I think I was buying litharge and red lead, I am not positive.

Q. In 1941?

A. Yes.

1962 Q. Do you recall the price basis, the method of computing the price that existed as to those transactions in 1941?

A. In 1941 I believe litharge was $1.50 above New York market.

Q. New York market for what?

A. Lead. The litharge was $1.50 above the New York market. I am not positive about that.

Q. As to red lead, do you recall what the differential was?

Mr. DuBose: I object, Your Honor, and move to strike out the last answer also, upon the ground that this witness is not speaking of his own knowledge. He is giving an estimate, and in this situation if is not a general business condition; we are dealing with exact figures, and I think those exact figures ought to be produced rather than a witness' admittedly hazy recollection.

Mr. Wright: In that connection, Your Honor, we have made every effort to ascertain the exact invoices from this witness. He doesn't have them. Presumably the records of the National Lead Company which are in the possession of the National Lead Company will either bear out or make incorrect this witness' statement. Now I haven't got those records, and I know of no way of obtaining them.

Mr. DuBose: I will at this moment offer to the Federal Trade Commission or to any of their representatives all the invoices in the Cincinnati office, the New York

1963 office, the Chicago office, the Cleveland office, the St. Louis office, the Atlanta office, or any other offices in this country or any other country, for exact information as to any customer at any time covered by this proceeding.

Mr. Wright: Relating to this specific question, there is absolutely nothing to show and I am sure Mr. DuBose does not know whether these records are in the possession of any office of the National Lead Company. They may be, but we have no knowledge at this time. This witness is the proprietor of this business. He recalls his dealings over this period of years. Certainly he can testify as to his recollection of the price basis at which he purchased these products in 1941.

Mr. DuBose: If Your Honor please, there has been this testimony on two cents difference, five cents difference, not per pound but per battery. Now if that be pertinent—we say it isn't, in line with our objection—if it be pertinent, however, the exact figures, then, are tremendously important, and that is the basis of my objection.

Trial Examiner Norwood: I hope the exact figures will be put in later, provided they can be secured, but in the meantime I can't exclude some evidence from the manufacturers on these prices if they do recollect them.

Now you referred to a hazy recollection of this thing.

1964 I don't want this witness to give any hazy recollection, but if he is fairly well convinced that such and such was the price, if that is his best recollection and he feels he can recall it with reasonable clearness, I am going to let him give it to us, subject to a check from these accurate figures which you can produce later.

Mr. Wright: Now, Your Honor, in view of the statement made by Mr. DuBose, I now request that the National Lead Company produce their invoice records of transactions with the American Battery Company during the year 1941; and in the event that production is made, I will be perfectly willing to agree to a motion to strike this previous answer.

Mr. DuBose: We will be glad to furnish any such invoices, but we can't furnish them today.

Mr. Wright: I appreciate that.

Mr. DuBose: And this is not the best evidence, in line with Your Honor's ruling in Washington. This man's recollection as to what the records will show is certainly not the best evidence.

Trial Examiner Norwood: I don't think I ever in my life ruled that some particular paper was the best evidence of prevailing prices. It may be more satisfactory evidence, but it would not be the best evidence in the sense that it excluded parol evidence.

Mr. DuBose: I don't know why it wouldn't.

1965 Mr. Wright: This is a tempest in a teapot that we have now. Certainly there is no question that the witness' answer wasn't in line with what the officials of the National Lead Company, and everyone else, has said was the going price of the products in 1941. I fail to see the significance of the contention.

Mr. DuBose: There were various prices, quantity dis-

counts and so on. If this whole line of questioning be pertinent, then I think we ought to have the exact figures. I say it is not pertinent.

Trial Examiner Norwood: Will you, Mr. Reporter, please read the pending question?

(The reporter read the question as follows:

"Q. As to red lead, do you recall what the differential was?")

Trial Examiner Norwood: I will ask the witness to state that, if he knows it, if he is fairly satisfied that he recollects what that was.

Mr. Welch: I would like to make a different objection to the one that has been raised. I think the question is improper. It assumes that it is on a differential basis. I think he should ask what the price of red lead was. I don't like the implication of the quetsion as to a differential.

Mr. Wright: The question was based on a differential because in answer to a previous question the witness stated the differential as to litharge.

1966 Trial Examiner Norwood: I think he may answer, and if there was no differential the witness may tell us so.

If you are fairly well convinced that you remember what that differential was, tell us about it; and if not, say that you don't know, that you are not certain.

A. I don't think I could answer anything as to that positively, and I am not positive of the differential on red lead.

By Mr. Wright:

Q. Mr. Taylor, in this market area that you have described, within a radius of 200 miles of Nashville—I will withdraw the question.

Mr. Wright: No further questions.

Trial Examiner Norwood: We will have a short recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Cross-Examination by Mr. Pearce.

Q. One question that I would like to ask. I believe you said you purchased oxides from Eagle-Picher. In what year did you purchase oxides from them?

A. I don't remember what year. Sometime between 1940 and 1945, but I don't remember the year.

Mr. Pearce: That is all.

Mr. DuBose: No cross-examination.

Mr. Welch: No cross-examination.

1967 Mr. Wright: Just one more question—

Mr. Welch: (Interposing) We object to any additional questions that don't lead to the rebuttal of the cross-examination.

Trial Examiner Norwood: He may ask it, and you may cross-examine him on anything you wish to.

Redirect Examination by Mr. Wright.

Q. You stated that you purchased from Eagle-Picher sometime between 1940 to 1945. In what quantities did you purchase from them?

A. Carload lots.

Q. Do you recall the price basis on which you purchased from Eagle-Picher?

A. I don't remember the prices. They were based on the lead market price.

Q. Were you at the same time—did the National Lead Company, at the same time you were purchasing from Eagle-Picher, offer to sell you oxides?

A. They didn't make me any prices on the oxide. Their salesman called on me, but he was more or less wanting the business back, but I don't remember him ever making me any prices.

Q. And you don't recall whether the prices at which you were purchasing from Eagle-Picher were the

1968 same as the prices at which National was quoting you at that time?

A. No, sir, I don't think that National quoted me at the time I was buying from Eagle-Picher.

Mr. Wright: No further examination.

Mr. DuBose: No further questions.

Trial Examiner Norwood: You are excused, Mr. Taylor.

(Witness excused.)

Mr. Wright: I would like at this time to request counsel for the Eagle-Picher Company to produce invoice records of transactions with the American Battery Company represented by this witness.

Mr. DuBose: May I make an objection to that request at this time. Mr. Pearce is in this case for the first time this week, and Mr. Wood has for the most part been handling it, and Mr. Wood asked me to give all the help

I could to Mr. Pearce; and I think that that request should be made by letter to Mr. Wood, if you don't mind, Mr. Wright.

Mr. Wright: I would be glad also to take it up with Mr. Wood by letter, but I assume that my request—

Mr. Pearce: (Interposing) I will pass that request on to Mr. Wood, and he will be back in the case very shortly and I am sure that he will answer the request.

Mr. Wright: That is entirely satisfactory.

Trial Examiner Norwood: He is making the request on the record, and Mr. Wood will see it. He is not
1969 requesting that it be produced now.

Mr. Welch: Off the record, please.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Call your next witness.

Mr. Wright: I will call Mr. Steiner.

PERRY STEINER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Steiner, will you state your full name, address, and occupation for the record.

A. My name is Perry Steiner, a partner in the Cumberland Battery Manufacturing Company, 201 First Avenue South, Nashville, Tennessee.

Q. What is the business of the Cumberland Battery Company?

A. We manufacture storage batteries.

Q. Over how long a period has that company been so engaged?

A. Since 1932.

Q. How long have you been affiliated with it, Mr. Steiner?

A. Since 1932.

Q. As a partner for that whole time?

1970 A. Yes.

Q. What type of batteries are manufactured by the company?

A. Lead-acid.

Q. Are they automotive replacement batteries or industrial batteries, or what type?

A. Automotive replacement.

Q. Do you manufacture a complete line of replacement batteries?

A. Yes.

Q. About how many sizes and types are there in your line, roughly?

A. Approximately 35.

Q. Over what market areas do you sell batteries?

A. Offhand, about 17 States.

Q. How far North of Nashville do you sell?

A. Three hundred miles North.

Q. That would be at what localities?

A. The Southern part of Missouri.

Q. Do you sell in Kentucky and Indiana?

A. In Kentucky, but not Indiana.

Q. Can you state what those 17 States are in which you sell?

A. Not offhand. They are mostly Southern States.

Q. Do you sell throughout the States of Georgia and Alabama?

A. Yes.

Q. And do you get into Louisiana?

1971 A. Yes, the Northern part of Louisiana.

Q. Do you sell in Mississippi?

A. Yes.

Q. Throughout the State?

A. Yes.

Q. About how far East do you go?

A. We go into North and South Carolina, approximately 350 or 400 miles from Nashville.

Q. Do you have any business in Florida?

A. In the Northern part of Florida, yes.

Q. Where are your accounts in Northern Florida?

A. We go down to Palatka.

Q. Do you do business in Jacksonville?

A. Yes.

Q. Panama City?

A. Yes.

Q. Approximately how many batteries do you manufacture a day, in normal times?

A. Well, we have a capacity output of approximately a thousand batteries a day, under normal circumstances.

Q. To what class or classes of trade do you sell?

A. We sell to dealers.
Q. For resale?
A. Yes.
Q. To the public?
1972 A. Yes.
Q. Do you have any accounts who are jobbers or distributors?
A. The jobbing and distributing accounts we have represent about 5% of our total volume.
Q. Now in normal competitive times, let's say in the period from 1936 to 1941, who were your principal competitors in the market area you have described?
A. The principal competitors were those companies which were tied in with national distribution, primarily the oil companies, the chain and mail order houses.
Q. Can you name some of those who fall within that category and represented your principal competition?
A. Western Auto Supply, Sears Roebuck, Montgomery Ward, Standard Oil, and several others, I don't recall the names off-hand.
Q. Were you in competition with the National Battery Company in that area?
A. Yes, we were in competition with them.
Q. With Globe Union Battery?
A. Yes.
Q. With Willard and Exide?
A. Yes.
Q. With the Grant Storage Battery Company?
A. I couldn't say, because they make probably private brands that we might run into, but I don't know.
1973 Q. You don't know of any private brands, for sure, that they make?
A. No.
Q. Bowers Battery Company of Reading, Pennsylvania?
A. You are speaking of 1941?
Q. Yes, from 1936 to 1941.
A. We did run into competition from Bowers, yes, from 1936 to 1941.
Q. Are you also in competition with the smaller battery manufacturers located throughout that area?
A. Well, it is natural that we would be in competition in any areas that we go into, that is obvious.
Q. Now can you give us a statement of the competitive situation in this area in the storage battery business during 1936 to 1941 with regard to price competition?

Mr. DuBose: I object as not being within the scope of the pleadings.

Trial Examiner Norwood: Objection overruled.

The Witness: Would you state that question again?

Mr. Wright: Will you read it?

(The reporter read the question as follows:

"Q. Now can you give us a statement of the competitive situation in this area in the storage battery business during 1936 to 1941 with regard to price competition?")

1974 A. Well, as I see it personally, it was competitive where there was a normal flow of business. We used the practices that were prevalent in that day, of having batteries of all prices ranging from $3 on up to the better grades that we made. We were in a fairly competitive position because we were making all types.

By Mr Wright:

Q. Did you, in that period, sell batteries as low as $3?

A. Yes, we did.

Q. What type of battery was that? Was that a 13-plate battery?

A. That was known as a short-plate battery.

Q. Were there batteries of the same type offered by any of your competitors at lower prices in that area during that period?

A. Yes, there were.

Q. Do you recall which competitors offered them at lower prices, and what those prices were?

A. It is rather difficult to recall back that many years ago. I don't recall the exact prices, except that I remember that they were below the prices that we quoted. As a matter of fact, they were sold to the general public at the same price that we were selling to the dealer trade.

Q. Do you recall what your margin of profit was on the batteries which you sold for $3 at that time?

1975 Mr. Welch: Your Honor, I take it that we may have a continuing objection to this line of questioning, based on the same objections, that we had with respect to the previous witness?

Trial Examiner Norwood: Yes.

A. I don't recall the profit on the competitive batteries at that time.

By Mr. Wright:

Q. Do you recall your costs of production on that battery at that time?

Well, the cost varied from year to year, according he change in prices of the materials. I couldn't give definite figure for any specific year. I don't recall.

From what company or companies does Cumberland chase lead oxides?

During 1932 to 1941, is that the question?

Yes.

We purchased from Eagle-Picher Lead Company the National Lead Company.

In the period from 1936 to 1941, in what quantities you purchase? Did you purchase in carload lots or 5-lots—

(Interposing.) We purchased in carload lots.

During the year 1941, from what companies did you chase?

We purchased lead from Eagle-Picher Lead Company and the National Lead Company.

Q. From both companies?

A. Yes.

Do you recall the total quantity that you purchased n each of those companies during that year?

Yes, I have the figures here. Thirteen carloads n each company, a total of 26 cars for that year.

Can you state the price basis on which you chased?

The price basis that we paid these lead companies based on their differential charge of $1.50 and $1.75.

What was that differential—

(Interposing.) Plus the cost of the lead. In other ds, we bought on the quoted lead market plus $1.50 $1.75 per thousand pounds.

The $1.50 differential was for what product?

For the negative mix, the negative oxide.

Is that litharge?

Yes.

What was the $1.75 differential?

For the red lead, or positive mix.

You say that that differential was over the cost of lead, is that correct?

Yes, that is correct.

At what market, do you know?

It was based on the current lead market.

Q. At what point?

A. We normally purchased on the East St. Louis lead market.

Q. Was your purchase, then of the negative mix at $1.50 over the St. Louis lead market?

A. That is right.

Q. Do you know the points of origin of the shipments of oxides to you from Eagle-Picher?

A. As I recall it, before 1941 I know their plant was in Joplin. I am not sure whether it came out of St. Louis or Joplin.

Q. Can you state where the oxides you purchased from National Lead Company were shipped from?

A. Some came from St. Louis, and I think some came out of Cincinnati.

Q. Lead shipped out of Cincinnati?

A. I don't recall where National has been shipping from, because I don't handle the purchases and am not too familiar with the shipping point.

Q. Were you requested to furnish invoices showing your transactions in oxides during 1941, and to bring them to the hearing?

A. Yes.

Q. Were you able to locate such invoices?

A. No, we were not. I brought a transcript of our book records showing the amounts that were purchased.

Mr. Wright: No further examination.

1978 Trial Examiner Norwood: Cross examine.

Mr. Welch: Your Honor, may we have a minute or two recess?

Trial Examiner Norwood: Yes—a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to ask the witness one more question before tendering him for cross examination, if there is no objection by counsel.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Do you recall your statement of the price basis at which you purchased lead oxides, Mr. Steiner?

A. Yes, and I am sure I was wrong on it. I was thinking of pig lead that we purchased on the East St. Louis market. The oxides were purchased on the New York market lead price.

Q. At a differential over new York?

A. Yes.

Mr. Wright: No further questions.
Trial Examiner Norwood: Cross examine.

Cross Examination by Mr. DuBose.

Q. Mr. Steiner, was that at a differential over the New York pig lead market?
A. Yes.
1979 Q. I believe you said, Mr. Steiner, that you or your company was in competition with Sears Roebuck, Montgomery Ward, and other large chains?
A. Yes.
Q. Was that direct competition with you or competition between their customers and your dealers?
A. Between their customers and our dealers, yes.
Mr. DuBose: No further questions.
Trial Examiner Norwood: You are excused.
(Witness excused.)
Trial Examiner Norwood: Call your next witness.
Mr. Wright: I will call Mr. Hester.

EUGENE NELSON HESTER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Hester, will you state your full name, occupation and business address for the reporter?
A. My name is Eugene Nelson Hester; I am connected with the Hester Battery Manufacturing Company of 418 Second Avenue, South, Nashville.
Q. What is your connection with that company?
A. I am vice president.
1980 Q. Over how long a period of time have you been connected with the company?
A. Practically all my life. During that time I served in the Army and have gone to school, naturally.
Q. Who are the other officers of the company, Mr. Hester?
A. My father, C. A. Hester; and my mother, Mrs. C. A. Hester.
Q. How long has the company been in business?

A. Since 1928.

Q. What products are manufactured by the company?

A. Batteries and batteries only.

Q. What type of batteries?

A. Automotive, primarily, truck, bus, radio, a certain amount of industrial batteries, and farm light.

Q. Do you make a complete line of automotive replacement batteries?

A. Yes, sir, we do.

Q. Over what market area does Hester normally sell its batteries?

A. Approximately five states. Of course that is partial because we don't cover all of those states. In certain cities it isn't feasible for us to go there.

Q. What are those states?

A. Kentucky; Tennessee; Alabama; part of Georgia; and North Carolina and South Carolina.

Q. Do you travel salesmen over those states?

1981 A. Yes sir, we do.

Q. Are there any of those States that you cover completely?

A. None of them that we absolutely cover completely.

Q. Do you sell in Atlanta?

A. We have one account in Atlanta.

Q. Do you sell in Memphis?

A. To one account there.

Q. Do you sell in Birmingham?

A. Yes sir, we have three accounts in Birmingham.

Q. What is the approximate average daily output of batteries of your plant in normal times?

A. Around 150 a day.

Q. From what company or company or companies does Hester purchase oxides?

A. The National Lead Company. We have dealt with the Eagle-Picher and also Hammond Lead Works.

Q. Over what period of time have you dealt with The National Lead Company?

A. For approximately ten years we have used their products almost exclusively.

Q. In what quantities do you purchase?

A. We purchase in carload rates, although they ship it by truck due to the fact that we don't have a siding.

Q. They ship it by trucks?

A. Yes.

Q. From what shipping points do they send it?

1982 A. It generally comes from St. Louis if they have the oxides, if they don't we get it out of Atlanta, Georgia.

Q. Over what period have you purchased from Eagle-Picher?

A. Well, only a short period of time. At one time, although I can't give you the definite dates, we did buy quite a bit of oxide from Eagle-Picher.

Q. Can you give us the approximate dates?

A. Probably in 1937 or 1938.

Q. Did you bring with you any invoices showing transactions with National Lead Company?

A. In 1941, which I was requested to.

Q. Do you have those invoices with you at the present time?

A. Yes, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I would like to ask that these documents be marked as Commission's exhibits.

Mr. DuBose: In evidence, or for identification?

Mr. Wright: For identification at this time.

Trial Examiner Norwood: They will be marked as Commission's Exhibits 842-A to 842-I, inclusive, for identification.

(The documents referred to were marked Com-

1983 mission's Exhibits 842-A, 842-B, 842-C, 842-D, 842-E, 842-F, 842-G, 842-H, and 842-I for identification.)

By Mr. Wright:

Q. Mr. Hester, I show you these documents which have been marked for identification as Commission's Exhibits 842-A to 842-I, inclusive, and ask you to state what they are?

A. The first is dated March 6, 1941, covering 60 drums of Bartons Battery Litharge, 36,000 pounds, and the price is $7.15 per—

Trial Examiner Norwood: (Interposing.) Don't read from the invoices if they are to be offered in evidence; just identify them. Just state what they are.

Mr. DuBose: May I look at them?

(The documents were handed to Mr. DuBose for examination.)

Mr. DuBose: Mr. Wright, I will concede, subject to correction, that these are invoices and shipping memoranda attached thereto, from the Cincinnati office of The National Lead Company and the St. Louis Branch, as indicated on the respective invoice or memoranda, for the dates thereon shown, showing sales of various oxides as named thereon by the National Lead Company to Hester Battery Manufacturing Company, Nashville, Tennessee, and I have no objection to them going into evidence.

By Mr. Wright:

Q. Mr. Hester, do these papers, Commission's Ex-
1984 hibits 842-A to 842-I, inclusive, represent records of transactions of purchase of the products named thereon by your company from The National Lead Company?

A. They do.

Mr. Wright: Your Honor, I offer these in evidence.

Mr. DuBose: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 842-A through 842-I, were received in evidence.)

By Mr. Wright:

Q. Mr. Hester, what is your principal competition in the market area which you described, in normal competitive times?

A. Our main competition is the large manufacturers of products that have tie-in sales with batteries. For example, the Ford Motor Company has its own battery and they require the Ford dealers to sell that battery. General Motors has the same thing. Gulf Oil Products has the same thing, and also Pure Oil Company. There are a number of those concerns.

Mr. Welch: I assume that as to this witness, as well as the immediately preceding one, we continue to have a continuing exception to this type of testimony as to relationships between third and fourth parties that have no connection with this witness?

Trial Examiner Norwood: Counsel may have such
1985 a con— objection and exception to that type of testimony just described.

By Mr. Wright:

Q. Mr. Hester, to what class of customer do you sell your battery?

A. Generally to garages and motor car companies and filling stations.

Q. Who in turn resell them?

A. Yes, to the consumer.

Q. Have you been advised by such customers regarding the competition which they encounter in this market area?

A. I don't follow your question.

Q. What is the source of your information regarding competition from the companies that you named, Ford, and General Motors, and Standard Oil?

A. Naturally I have gotten out and sold on the road myself, as well as the fact that I hear other salesmen speak of the competition they have encountered.

Q. Have you been advised of this competition by the dealers to whom you sell?

A. Certainly.

Q. And whom you solicit?

A. Certainly. Quite frequently a small concern like ours will go in to solicit the business of, say, a Chevrolet dealer, and he will tell us, "Gentlemen, I am sorry, 1986 I would like to buy your batteries, you are local people and you have got a good product, but we can't buy them, we have to sell what General Motors says for us to sell."

Q. Do you know what battery is handled on that basis by General Motors?

A. They have the Delco battery; that is their own plant.

Q. Do you know what battery is handled on that basis by the Ford Motor Company?

A. They have a Ford battery, but it is built by other organizations.

Q. Do you know what other organizations build that battery?

A. One concern that I know does have a contract with them is the Globe Union Corporation.

Q. Do you know what battery is handled on that basis by the Standard Oil Company?

A. The Standard Oil Company has the Atlas battery, they have a complete line of Atlas products, but who manufactures that battery I don't know. I don't think that Standard manufactures them themselves.

Q. Are you in competition, or are your dealers in competition, with Sears Roebuck?

A. Certainly, our dealers are.

Q. Do you know who manufactures the battery for Sears Roebuck?

A. The Globe Union Corporation. I understand that quite frequently batteries will be manufactured by
1987 more than one concern, that they might have contracts with several different battery manufacturing companies at the same time, supplying the same brand name.

Q. Mr. Hester, will you tell us what the situation was in your market area in the period say from 1938 to 1941 as to price competition on batteries?

A. Yes. That is rather a wide field. In our particular case a battery at that time that we would sell, a standard 15-plate, 18 months guarantee battery, we would sell that battery at that time for around $5.95 to the dealer. The dealer in turn would sell it for around $9.50 to $9.60. Of course I don't know the exact figures at that time. We have old price lists if you should want them. Other concerns sold at approximately the same figures on that size of battery, but the competition that we encountered then other than with respect to these tie-in sales, would be the fact that quite a few of the companies would have highly competitive batteries, lightweight batteries, batteries say with a six months' guarantee, which they would sell for $3.10 and $2.85, and in some cases I have even heard it rumored that they would get down as low as $2.18.

Q. Can you state what firms were offering these low-powered batteries at $3.10 and $2.85?

A. Yes sir. I understand that the Bowers Battery Manufacturing Company had a battery at that price, and
1988 so did Royal. I understand that most all concerns did have a competitive battery.

Q. Did you manufacture a battery in that price range?

A. We manufactured a battery that we sold for $3.50 to the dealer, guaranteed for six months.

Q. These prices that you referred to of $3.10 and $2.85 were the prices to the dealer, or the retail prices?

A. The prices to the dealer.

Q. Do you recall the prices in that period at which Sears Roebuck was offering these cheap batteries for sale at retail?

A. They were offering an 18 months, 15-plate, Group 1 battery for about $4.45 and your old battery. Of course we would find that a Sears Roebuck store in one community would offer a battery at a different price than in another community.

Q. Was that substantially the same battery as the one you sold to dealers at $5.95?

A. It was approximately the same battery. It had about the same thickness of plates and the same type of case and so forth.

Q. At what period of time was it that you were offering this battery with the six months' guarantee at $3.50?

A. Do you mean how long a length of time we offered it for sale?

Q. Yes sir.

A. From about 1932 up until the first of the war, 1941.

Q. Do you know what your profit margin was on that battery?

A. I am of the opinion that we lost slightly on a 1989 battery of that capacity at that price. The reason I can't tell you exactly is because we don't have elaborate cost accounting systems; we have more of an overall picture.

Q. In purchasing oxides from the National Lead Company do you know the basis on which the prices were computed?

A. I was told that those prices were computed on the market price of pig lead, and a certain addition added for converting it from the metallic form over to the oxide.

Mr. DuBose: I move to strike out the answer on the ground that it is hearsay—"I was told."

By Mr. Wright:

Q. Who told you that?

A. Representatives of the lead companies.

Trial Examiner Norwood: Motion denied.

By Mr. Wright:

Q. Do you recall the price basis on which you purchased from the Eagle-Picher Company, as to oxides?

A. It was approximately the same basis as the National Lead Company.

Q. Do you know what that differential was, or on what market it was based?

A. Do you mean whether it was based on the New York or St. Louis market?

Q. Yes.

A. I understood that it was the New York market.

1990 Q. Do you know what the differential was on lithium carbonate or negative oxide?

A. Do you mean the amount of mark-up?

Q. Yes.

A. I was of the opinion that it was $1.50 per thousand.

Mr. DuBose: I move to strike the answer on the ground that it is an opinion statement, and he is not being asked as an expert.

Mr. Wright: I will withdraw the question.

Trial Examiner Norwood: Strike the answer.

Mr. Wright: I have no further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: No questions.

Mr. Wright: May I ask one question?

Trial Examiner Norwood: Counsel may ask another question.

By Mr. Wright:

Q. Did you appear here, Mr. Hester, as the result of a subpoena requiring your attendance at this hearing?

A. Yes sir, I did.

Q. You didn't volunteer to be a witness in this proceeding?

A. No sir, I didn't.

Cross-Examination by Mr. Welch.

Q. Mr. Hester, you did have some interviews with

1991 representatives of the Federal Trade Commission prior to the time you were subpoenaed?

A. Yes sir, I did.

Q. Was one of them named Mr. Dixon?

A. I don't recall the name.

Q. Did he have a Southern-sounding voice?

A. That would be hard for me to say. I don't know what a Southern-sounding voice is.

Q. Did you know that he was a Nashville man?

A. I understood him to state that he had previously lived at Nashville.

Q. And had gone to school at Vanderbilt?
A. Yes, sir.
Mr. Welch: That is all.

Redirect Examination by Mr. Wright.

Q. Did he inquire if you would be willing to appear as a witness in a proceeding before the Federal Trade Commission?
A. He asked me if I was willing and I told him that if I was subpoenaed I would have to appear.
Mr. Wright: No further questions.
Mr. DuBose: No further questions.
Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness, 1992 Mr. Wright.

Mr. Wright: Your Honor, I have no more witnesses at this time and suggest that we recess until ten o'clock tomorrow morning at Birmingham.

Trial Examiner Norwood: Is that agreeable to counsel?

Mr. DuBose: Yes sir.

Trial Examiner Norwood: The motion is allowed and the hearing is now adjourned to reconvene in the City of Birmingham, Alabama, at 10 o'clock a. m., Central Standard Time, November 22, 1946, in Room 210, Jefferson County Court House in said city.

(Whereupon, at 12:10 p. m., November 21, 1946, the hearing in the above-entitled matter was adjourned to Birmingham, Alabama, at 10 o'clock a. m., CST, November 22, 1946.)

1993

Room 210, Jefferson County Court House,
Birmingham, Alabama,
November 22, 1946.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James W. Pearce, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

1994

PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Nashville, Tennessee, on November 21, 1946, the hearing in Docket 5253 is now convened at 10 o'clock, a.m., on November 22, 1946, in Room 210, Jefferson County Court House, Birmingham, Alabama.

The reporter will please enter the appearances.

Call your witness.

Mr. Wright: I will call Mr. McKinley.

FRANK F. McKINLEY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. McKinley, will you state your full name, occupation and address for the record, please?

A. Frank F. McKinley, 2011 Second Avenue, South, Birmingham, Alabama.

Q. What is your occupation, Mr McKinley?
A. Battery manufacturing.
Q. Do you manufacture batteries at that address which you just gave?
A. Yes, sir.
1995 Q. Under what trade name do you operate?
A. We use the name of Liberty.
Q. Is the enterprise a corporation, a partnership, or what?
A. It is a partnership.
Q. And what is the name of the partnership?
A. We operate under the name of Alabama Electric Battery Company.
Q. Are you a partner in that business?
A. Yes, sir.
Q. How long have you been engaged in the manufacture of batteries?
A. About 25 years.
Q. Here in Birmingham for that entire length of time?
A. About 20 years in Birmingham and 5 years in Chicago.
Q. How long have you operated as the Alabama Electric Battery Company?
A. About ten years.
Q. What type of batteries do you manufacture?
A. Automobile replacement batteries.
Q. Do you manufacture a complete line of replacement batteries?
A. Yes, sir.
Q. What is the average daily output of batteries by your concern?
A. Right now about between fifteen and twenty.
Q. In what market areas do you sell those batteries?
1996 A. Just here in Birmingham at the present.
Q. To what types of customers do you sell?
A. Well, partly retail, and right now we are selling to some dealers that retail them.
Q. About what percentage of your business, roughly, is at retail?
A. At the present about 25 per cent.
Q. What was that percentage in 1941, do you recall?
A. Well, at that time it was practically all what you would call retail. We had some customers that were fleet

owners or car dealers where we sold them at a discount, but it was practically retail entirely at that time.

Q. Did the fleet owners use the batteries themselves?

A. Yes, they weren't for resale, but for their own use.

Q. Who were your principal competitors in the battery business in your market area in the period from 1936 to 1941?

A. Our main competition was from mail order houses, such as Sears, Roebuck and Western Auto Supply. We had some competition from Nashville, and there was another manufacturer here in town that sold some to dealers and didn't sell any retail, but we could meet that competition easily enough.

Q. You mentioned competition from Nashville, what competition was that?

A. From the Cumberland Battery Company which did quite a lot of business here, and the American Battery
1997 Company did some, and there were some Hester batteries here.

Q. Does the National Battery compete in this area?

A. Well, they ship some in. You mean the National Battery Company?

Q. Yes.

A. As I understand it they make batteries for several different companies under different names—.

Mr. DuBose: I move to strike the answer as not responsive.

Trial Examiner Norwood: Read the question and answer, Mr. Reporter.

Mr. Wright: Your Honor, he hadn't finished his answer. He was explaining it. I assume we will know more when he finishes as to just how the National Battery Company does compete in this area if it competes.

Trial Examiner Norwood: Read the question and the portion of the answer that he had given.

(The Reporter read the record as follows:

"Q. Does the National Battery compete in this area?

"A. Well, they ship some in. You mean the National Battery Company?

"Q. Yes.

"A. As I understand it they make batteries for several different companies under different names—")

1998 Trial Examiner Norwood: Motion denied; finish your answer.

The Witness: They sell batteries here, and that is competition.

By Mr. Wright:

Q. Are Willard and Exide competitive with you in this area?

A. Yes.

Q. How about the Bowers Battery Company?

A. At different times they ship batteries in here. They haven't had a regular dealer here all the time but they have at several times shipped batteries in here.

Q. How about Grant?

A. No, I haven't seen any of those here.

Q. How about Auto-Lite?

A. Yes, Auto-Lite.

Q. Will you state what the competitive conditions were in this market area in the storage battery business in the period from 1936 to 1941?

A. Well, the competition was pretty keen. There was quite a lot of price cutting; prices were low and those conditions were pretty bad. It was pretty hard for us to compete due to the fact that we were a small company and buying in small quantities.

Q. Were you able to meet the prices that existed in this area in that period which were quoted by Sears Roebuck?

1999 A. No sir, we didn't sell at that low a price.

Q. Do you recall the prices which were quoted in this area in that period by Sears Roebuck and some of the other concerns that you have named as competitors?

Mr. DuBose: I object upon the same ground as I did yesterday, to this whole line of questioning.

Trial Examiner Norwood: Objection overruled.

The Witness: The answer is no.

By Mr. Wright:

Q. Did you, in the period 1936 to 1941, make a 13-plate battery?

A. Yes, sir.

Q. What was your selling price on that battery in 1941, do you recall?

A. As near as I recall it was $7.50.

Q. Was that the retail selling price?

A. Yes.

Q. Was that the cheapest battery in your line?

A. Yes; we built some that sold for less than that but as to completely new batteries that was the cheapest one we made.

Q. Do you recall what your selling price on that battery was in the period prior to 1941, say back to 1936, 1937 or 1938?

A. About the same, as near as I can remember.

Q. From what company or companies have you purchased lead oxides?

2000 A. Eagle-Picher Sales Company.

Q. Is that true over the whole period of your operations?

A. Yes, sir.

Q. In what quantities have you purchased the oxides?

A. Well, back in 1941 we only used from 600 to 1200 pounds a month. At the present we are buying about 3000, which is the limit that we are allowed to buy.

Q. In what quantities did you order in that period of time from Eagle-Picher?

A. We usually ordered two drums—1200 pounds.

Q. Were you requested to bring with you invoices showing purchases from Eagle-Picher during 1941?

A. Yes, sir, but I couldn't find an invoice dated that far back.

Q. Do you know the prices which you paid for oxides from the Eagle-Picher Company in 1941?

Mr. DuBose: The same objection, if Your Honor please.

Trial Examiner Norwood: Objection overruled.

The Witness: From our ledger records it was $8.50 on what they call Zerox, and $8.75 on Perox.

By Mr. Wright:

Q. Mr. McKinley, can you state what your profit was on a per battery basis in the period from 1936 to 1941?

2001 Mr. DuBose: I object upon the ground that this wouldn't be the best evidence. I think, if this be pertinent, that the books of the company would be the best evidence.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Mr. Wright: Your Honor, it is obvious in this type of testimony that if we were required to produce the books and records of every witness on this point that we would be here endlessly. Certainly what a partner in the busi-

ness states his profit was, is competent evidence of that fact.

Trial Examiner Norwood: I think so; the objection is overruled.

The Witness: Well, the profit during that period was —in fact there was no profit, figuring a reasonable compensation for ourselves. We were small operators and if we figured reasonable salaries for ourselves there would be no profit in that quantity. In fact you would figure a loss if you figured on a fair compensation.

By Mr. Wright:

Q. Mr. McKinley, if you were able to save, on your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?

Mr. DuBose: The same objection, and on the additional ground that it is purely hypothetical. There is no evidence in the record that anyone could have saved ten cents
2002 per battery.

Mr. Wright: Your Honor, that goes to the very issue of the case. One of the principal issues is discrimination and I believe from other parts of the record it is obvious that the discrimination that is at issue would amount to at least ten cents per battery, and the question of the effect of that discrimination is at issue here.

Trial Examiner Norwood: Isn't there some evidence in the record from which it could be determined that some dealers whould save as much as ten cents on a battery?

Mr. DuBose: I don't believe so.

Mr. Wright: It has been testified to by this witness, Your Honor, that he makes a full line of batteries, and by numerous other witnesses that an ordinary 15-plate battery requires about 23 pounds of lead, 40 percent of which is oxides—

Mr. DuBose: I would like to move to exclude the witness if we are going to have this sort of argument. I think it is a little leading. I don't think that that is in Mr. Wright's mind but I believe that it is a little leading, if I may put it that way.

Trial Examiner Norwood: I think his answering my question is not informing the witness of anything, because he is answering as to what is already in the record.

Mr. DuBose: I don't think we have gone that far
2003 yet, but I didn't want him to go into certain details

that might put words in the mouths of the witness, that is all.

Trial Examiner Norwood: I shall overrule the objection and let us stop the discussion. The witness will answer the question.

Mr. Wright: Perhaps the question had better be read.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. McKinley, if you were able to save on your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?")

Mr. Welch: I object to the question as being incomplete in that it is necessary, for his ability to compete to be improved, for the question to include the condition that he save five to ten cents per battery and his competitors to not have a similar saving. Otherwise the question is incomplete.

Mr. Wright: I am perfectly willing to accept that amendment to the question, Your Honor, and will ask the witness to answer with that condition added.

Trial Examiner Norwood: The witness will answer it from a standpoint of the savings which he would have received which his competitors would not have received. Can you answer that question?

2004 The Witness: Well, on the quantity of batteries which we were making it would amount to about ten dollars a month, which with us might have made the difference between profit and loss. Of course we are small operators.

Mr. Wright: No further questions.

Trial Examiner Norwood: Cross examine.

Cross Examination by Mr. DuBose.

Q. Mr. McKinley, you say your company is a partnership?

A. Yes sir.

Q. And you have been in business how long?

A. With the present company, about ten years.

Q. Have you been able to live?

A. I have managed to live.

Q. And you have stayed in the business?

A. Yes sir.

Q. And when you say that you made no profit over a

certain number of years you were taking into account what you thought you, as a partner, ought to get as reasonable compensation, is that correct?

A. That is correct.

Mr. DuBose: No further questions.

Redirect Examination by Mr. Wright.

Q. Mr. McKinley, what do you figure is a reason-
2005 able compensation to you for your services in that partnership?

A. Well, at the time you mentioned, back in 1941, up to that period I was making about $35.00 a week.

Mr. Wright: No further questions.

The Witness: That was 12 hours a day for a six-day week.

Mr. Wright: No further questions.

Trial Examiner Norwood: Thank you, Mr. McKinley. You are excused.

(Witness excused.)

Trial Examiner Norwood: Are you ready with your next witness, Mr. Wright?

Mr. Wright: Yes sir. I will call Mr. Burke.

W. A. BURKE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wright.

Q. Mr. Burke, will you state your full name and address for the record, please?

A. W. A. Burke. Four First Avenue, North, is the business address; 1113 Woodland Avenue is my home address.

Q. What is your occupation, Mr. Burke?

A. I am a manufacturer of batteries.

2006 Q. Under what trade name?

A. Truxton.

Q. What is the full name of that company?

A. Truxton Battery Manufacturing Company. However, I would like to state that I was operating under Burke's Battery Hospital up until the first of October of last year.

Q. Is that an individual enterprise, a partnership, or a corporation?

A. We started back into it the first of last October as a partnership, and operated for three months like that. Then I bought my partner out and I am operating as an individual.

Q. How long have you been connected with that business?

A. I have been making my own batteries since 1932, October 1, 1932.

Q. And have you been manufacturing batteries over that period?

A. I have been manufacturing batteries since that time with the exception of the fact that we closed down during the war. They took my help away from me, the Army got two of my skilled men in the same month and I had to close down on account of labor.

Q. What type of batteries do you manufacture, Mr. Burke?

A. Replacement batteries for automobiles.

Q. Do you make a complete line of replacement batteries?

A. For all popular makes of cars. I don't go into bus and special batteries, just passenger automobile and truck batteries.

2007 Q. What is your average daily production of batteries?

A. We run about 30 a day now, on the average.

Q. About what was your production of batteries in 1941?

A. Well, we weren't running but about 300 a month, then, two to three hundred a month.

Q. In what market area do you sell these batteries?

A. Principally in Birmingham and Jefferson County.

Q. To what type of customer do you sell?

A. Well, I sell retail. I have a filling station connected with me and I sell retail, and sell some dealer accounts too.

Q. About what percentage of your production is sold at retail?

A. About twenty per cent.

Q. Was that also true in 1941?

A. Yes.

Q. The same relation?

A. Yes.

Q. Mr. Burke, will you state who your competitors were in that market area during the period, say from 1936 to 1941?

A. Well, if you are speaking of retail competition, Western Auto and Sears Roebuck have always been our hardest competitors; and in the wholesale sales I would say Cumberland out of Nashville, that is on price, according to price. They are the only price competitors I have that bother me much, Cumberland. Of course Willard and Exide are
2008 well established, but their prices range up higher than ours.

Q. Are you also in competition with Delco?

A. Well, Delco took the largest account I had away from me in about 1934, not on price but because of the fact that the Birmingham Electric Battery Company was selling my batteries—I was building batteries for them at that time—and Delco put the pressure on them on account of the other lines of merchandise—United Motor Service was their sales organization.

Q. Did that account tell you why they were discontinuing buying from you?

A. Yes.

Mr. DuBose: May I have the same objection to this line of questioning?

Trial Examiner Norwood: The same ruling.

By Mr. Wright:

Q. What was that reason?

A. Mr. Curry stated that United Motors had threatened to take the Delco Remy account and other accounts that they controlled, away from Birmingham Electric, if they didn't handle the Delco battery.

Q. Were you in competition at that time with the batteries sold by the various oil companies?

A. At that time I don't remember of any oil company having batteries. I don't think there were any oil
2009 companies in the battery business at that time. Atlas, which is the Standard Oil battery, have come into the business since; and Pure Oil has come into the picture since then; and of course all these others followed. I think Standard and Pure were the first two to get in the market with batteries.

Q. When was that, do you recall?

A. I can't recall exactly the date, but it was somewhere around 1935 or 1936.

Q. We were speaking of the 1936-1941 period.

A. Well, it was somewhere around that time, 1936, that they came into the picture. I don't remember offhand the exact date. I have been handling Pure Oil products in the station there since Jnuary, 1932, and I remember when I first went in the station they didn't like the idea of me handling these different lines of merchandise because they said it would interfere with my gasoline sales, that I would put too much time on batteries and tires and things like that. But less than two or three years later they were in it in a big way themselves, with the same line of thought that you had to have other merchandise to supplement your gas and oil sales.

Q. Mr. Burke, what prices did you quote on your standard batteries, leading standard batteries, during 1941?

A. Do you mean wholesale or retail?

Q. Both.

A. The wholesale price, if I remember right, was around $4.85 with the old battery exchanged. We used to trade in retail and wholesale on old batteries, and still do.

Q. What type of battery was that?

A. That was the Group 1 and low-type Ford. Group 2 low types, some of them term it.

Q. Were those 15-plate batteries?

A. The low-type is 15-plate and the Group 1 is 13-plate. My plates are heavier than those of the average manufacturer; I make a heavier plate.

Q. Do you recall the prices at which your competitors were offering similar batteries at wholesale and at retail in this area at that time?

A. I can't recall about the wholesale prices, because I didn't keep up with them very well, but my prices and Cumberland Battery Manufacturing Company's prices were close together, I had to compete with them to stay in business.

Q. Can you state what your margin of profit was on that battery on which you competed with Cumberland at that time?

A. On a wholesale basis it would run about 75 cents to a dollar a battery.

Q. Is that net profit that you are speaking of?

A. No, that is gross profit above material and labor.

Q. In other words, that didn't include any compensation for yourself?

A. No.

2011 Q. From what company or companies have you purchased lead oxides, Mr. Burke?

A. When I first got into it I had an agreement with Birmingham Electric Battery Company. They bought in carload lots and they sold to me—I built their batteries—on a cost-plus basis, and they furnished me with all the materials, cases, oxides and lead, acid and everything, and gave me a close price on it, and I in turn built batteries for them on that basis, on a cost-plus basis. It made me get the materials that I used in my own batteries much cheaper than I could have gotten them anywhere else.

Q. Over what period of time did that relationship exist?

A. 1932 to 1934.

Q. From whom did you purchase oxides subsequent to 1934?

A. I bought some direct from National Lead Company, and I bought through Aero Battery Company.

Q. In what quantities did you purchase, Mr. Burke?

A. At that time we just picked it up as we needed it because it was right here in town, maybe one or two drums at a time.

Q. When you purchased direct from National Lead Company, in what quantities did you purchase?

A. Small quantities; there weren't any large quantities?

Q. Was it as much as five tons at any time?

A. No sir, less than five.

Q. Do you recall the price basis that you were on 2012 in purchasing from National at that time?

A. I had price quotations all along from them; I still have them in my files. It varied. Say in 1938 I think it varied anywhere from about, as I recall, 6¼ to 8 cents a pound. That was the card price; they sent out a card every month.

Q. You bought on a card price basis?

Mr. DuBose: I move to strike out the last answer on the ground that the witness has stated that he has the exact figures in his records; therefore his testimony is not the best evidence.

Mr. Wright: Your Honor, before you rule on that may I ask the witness one more question?

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Do you recall whether the prices you paid National Lead Company at that time were the prices which appeared on their cards?

A. Oh yes, sure.

Q. And you purchased in less than five ton quantities?

A. That is right.

Mr. Wright: Your Honor, the price cards of National Lead Company on this material are already in the record, and the witness has stated that he purchased at those card prices.

Trial Examiner Norwood: Well, do you want him
2013 to try to give any further information about that?

Mr. Wright: No, sir. I am not trying to prove what the price was at that particular time. I will admit that the best evidence as to what the prices were would be the cards themselves. All I am attempting to establish is what was the price basis on which this company was quoted and sold.

Trial Examiner Norwood: I think that the price marked on the card is the best evidence of what the card showed, but not necessarily the best evidence as to what the price was. The price may have been different, above or below the card price. I will rule on this when you read the answer, Mr. Reporter.

(The reporter read the answer as follows:

"A. I had price quotations all along from them; I still have them in my files. It varied. Say in 1938 I think it varied anywhere from about, as I recall, 6¼ to 8 cents a pound. That was the card price; they sent out a card every month.")

Trial Examiner Norwood: The motion is denied in view of the fact that the exact figures are in the record.

By Mr Wright:

Q. Have you purchased oxides from any other suppliers, Mr. Burke?

A. This year I have purchased some from Metals Refining Company, Hammond, Indiana.

2014 Q. Had you purchased from them prior to this year, before this?

A. I don't recall of any purchases from them before May, I believe, or June, of this year.

Q. Mr. Burke, going back now to this period of 1936

to 1941, if you had been able to purchase the materials that went into the manufacture of your batteries, at five cents per battery cheaper than you did, and provided that your competitors had paid what they did, would that have affected your ability to compete in your market area?

Mr. DuBose: If your Honor please, I have the same objection, and in addition, with respect to this witness I have the further objection that this witness has already stated, as I recall it, that the majority of his oxides were purchased not from any one of the respondents but from the Aero Battery Company.

Mr. Wright: Your Honor, he has also testified that he did purchase from the National Lead Company during this period, and I believe he mentioned the year 1938.

Trial Examiner Norwood: I think he may be permitted to answer; the objection is overruled.

The Witness: That question was if I could have purchased at a lower price would I have been able to meet competition better?

Mr. Wright: Yes sir.

2015 Trial Examiner Norwood: At a saving of five cents on a battery.

The Witness: Of course in that period five cents meant a whole lot more than five cents does now, and the ability to buy at a lower price, of course, even at five or ten cents a battery, would make the difference between staying in the business and not staying in it.

Mr. Wright: No further questions, Your Honor.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. DuBose.

Q. Mr. Burke, you stated that you purchased oxides prior to 1934 from the Birmingham Electric Battery Company?

A. Yes.

Q. And after 1934 from Aero Battery Company and National Lead, is that correct?

A. Yes, that is right.

Q. Do you recall over the years from 1934 say up through 1941, what percentage of your needs were supplied by Aero Battery Company and what percentage you bought from National Lead?

A. Well, the major part of it was bought through Aero Battery Company.

Q. Through them?
A. Yes; they bought in carload lots and I bought it as I needed it.
2016 Mr. DuBose: No further questions.
Mr. Welch: No questions.

Redirect Examination by Mr. Wright.

Q. Mr. Burke, do you know who supplied the oxides to Aero that you purchased?
Mr. DuBose: I object to that upon the ground that it will be hearsay.
Trial Examiner Norwood: He asked if he knew. He can answer that yes or no.
The Witness: Oh yes, it is marked on the cans. You can identify that, there is no question.
Mr. Welch: I object on the further ground that it isn't proper redirect.
Trial Examiner Norwood: Strike that answer.
Mr. Wright: It is just going a step farther than the cross-examination along the same line.
Trial Examiner Norwood: Mr. Burke, he asked you whether or not you knew that.
The Witness: Yes, I know.

By Mr. Wright:

Q. How do you know that, Mr. Burke?
A. Well, your cans are stamped with the name of the company on the cans. They are metal drums, they come around 600 pounds to the drum. They vary a little
2017 bit. Some companies use one weight and some another.
Q. What company produced those oxides?
A. Well, Aero bought not from one company, but they bought from National Lead and Eagle-Picher Lead, if I recall. I have used some of both.
Q. You say that they bought in carload quantities?
A. That is right.
Q. What price was quoted to you by Aero?
A. They sold me on the same basis as I could order in less than five ton lots direct from the lead companies, the lead manufacturers.
Q. In other words, you paid the same prices that you would have paid had you purchased from National Lead Company?

A. That is right. In other words he changed his prices as they changed their prices, and sold me on the same basis as I could have bought direct.

Mr. Wright: No further questions.

Mr. DuBose: No further questions.

Trial Examiner Norwood: The witness is excused. Thank you, Mr. Burke.

(Witness excused.)

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2018 Trial Examiner Norwood: Call your next witness, Mr. Wright.

Mr. Wright: Your Honor, the other witness we had scheduled here today will not be called at this time, and I suggest that we now adjourn to the hearing scheduled in Washington on December 11, 1946, at 10 a. m.

Trial Examiner Norwood: Is that satisfactory to counsel?

Mr. Welch: Yes.

Mr. DuBose: Yes, Your Honor.

Trial Examiner Norwood: The motion is allowed and the hearing is now adjourned to reconvene in Washington, D. C., in the office of the Federal Trade Commission, in the Trial Examiners' Hearing Room, Room 332, at 10 o'clock, a. m., est., December 11, 1946.

(Whereupon, at 11:35 a. m., November 22, 1946, the hearing in the above-entitled matter was adjourned to Washington, D. C., in the offices of the Federal Trade Commission, at 10 o'clock a. m., e. s. t., December 11, 1946.)

2019 Room 332, Federal Trade Commission Bldg.,
Washington, D. C.,
January 7, 1947.

Met, pursuant to postponement, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq. and Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

H. E. Gardiner, Esq. and R. H. Ecker, Esq., of the firm of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York City, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

2020 Roger Hinds, Esq., 165 Broadway, New York City, appearing for the Glidden Company.

2021 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to postponement agreed to by counsel, the hearing in Docket 5253 is now reconvened for the taking of further testimony at 10 o'clock a. m., on January 7, 1947, in room 332, Office of the Federal Trade Commission, Washington, D. C. The last hearing was at Birmingham, Alabama, on the 22nd of November, 1946. Various appointments for additional hearings in Washington have

been postponed by agreement to this date. The reporter will please enter the appearances on both sides.

Mr. Wright: Your Honor, may we go off the record for a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I suggest, Your Honor, that we take a short recess to permit counsel to confer about a number of matters which are pending.

Trial Examiner Norwood: Very well; we will recess until 10:45.

(Short recess.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, after conference with counsel, a stipulation has been agreed upon covering certain facts, which I would like to read into the record.

2022 Trial Examiner Norwood: Proceed.

Mr. Wright: (Reading.) "It is hereby stipulated between counsel in the above matter that C. H. Allen, Vice-President, Vitalic Battery Company, Inc., 2040 Amelia Street, Dallas, Texas, if called as a witness in support of the complaint in the instant proceeding and questioned as set out below, would testify as follows:

"Question: State the name of the company, state of incorporation, and names of the officers.

"Answer: Vitalic Battery Company, Inc., a Delaware Corporation, with office and factory at 2040 Amelia Street, Dallas, Texas; G. U. Pickering, President, Omar Powers, Vice-President, C. H. Allen, Vice-President, D. L. Casso, Assistant Secretary.

"Question: Over how long a period has Vitalic been engaged in the manufacture of storage batteries and what general types of batteries are manufactured?

"Answer: In the business of manufacturing storage batteries for 13 years; automotive replacement S. L. I. types.

"Question: From what company or companies have lead oxides been purchased during the past 10 years?

"Answer: Oxides have been purchased for the past 10 years from Hammond Lead Products Company, Eagle-Picher Lead Company, National Lead Company.

2023 "Question: In what quantities have purchases been made and upon what price bases?

"Answer: Purchases made in 20-ton quantities at published carload prices for delivery at Dallas.

"Question: In what market areas does Vitalic solicit sales of storage batteries?

"Answer: The market areas are Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana and New Mexico.

"Question: In normal times, say, for instance, in the period from 1937 to 1941, was the battery business highly competitive in your market areas?

"Answer: In normal times battery business is highly competitive in our market areas.

"Question: Who are your principal competitors in this area?

"Answer: Our competitors in this area are as follows: Willard Storage Battery Company, Exide Storage Battery Company, National Battery Company, Sears Roebuck & Company (Globe Union), Montgomery Ward, Western Auto Supply, Auto-Lite, Continental & Lyle.

"Question: What percentage does the total cost of the lead oxides bear to the total material cost of this product?

"Answer: The cost of lead oxides averages approximately 33 percent of total material cost.

2024 "Question: In times of normal competition—for instance, from 1937 to 1941—would a saving to you of 5 to 10 cents on the cost of manufacturing a standard storage battery be important to you competitively in your market area?

"Answer: A saving in material cost of 5 to 10 cents per battery would be an important saving to us in times of normal competition."

Now, I understand that counsel for National Lead Company and Eagle-Picher Company agree that this statement may be taken for the record to the same extent and effect as if the said C. H. Allen had appeared as a witness and so testified.

Is that correct?

Mr. Ewing: That is correct, subject, Your Honor, to an objection similar to the objections made to similar lines of testimony heretofore offered in this case, and in particular, to the similar objections made with respect to questions similar to the last question relating to competition.

Trial Examiner Norwood: Yes, counsel may have that exception.

Mr. Wright: Is that correct, Mr. Serviss?

Mr. Serviss: That is correct so far as Eagle-Picher is concerned.

Mr. Wright: Any objection on the part of other 2025 counsel?

Mr. Gardiner: No, sir.

Mr. Ewing: I understand there is not.

Mr. Wright: At the hearing in Washington on October 4, 1946, in return to a subpoena duces tecum the National Lead Company produced certain documents, which I now ask to have marked for identification as Commission's Exhibits 843-A thru D, 844-A thru D, 845-A thru Z-7, 846-A thru Z-47½, 846-Z-48 thru 846-Z-294, 847-A thru Z-284, 848-A thru Z-5, 849-A thru Z-43, 850-A thru M.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 843-A thru D, 844-A thru D, 845-A thru Z-7; 846-A thru Z-47½, 846-Z-48 thru 846-Z-294, 847-A thru Z-284, 848-A thru Z-5, 849-A thru Z-43, 850-A thru M for identification.)

Mr. Wright: Your Honor, I believe Mr. Ewing has a statement to make with reference to these.

Trial Examiner Norwood: Are these offered in evidence now?

Mr. Wright: Not yet.

Mr. Ewing: The exhibits which Mr. Wright just listed consist of photostatic copies of invoices and other documents produced by Respondent National Lead, pursuant to subpoena, and delivered to Mr. Wright at the 2026 last hearing in Washington back in October; and these copies are copies of the original records.

Trial Examiner Norwood: Yes.

Mr. Wright: Your Honor, I will offer into evidence Commission's Exhibits 843-A to D, 844-A to D, 845-A to Z-7, 846-A to Z-294, 847-A to Z-284, 848-A to Z-5, 849-A to Z-43, and 850-A to M.

Trial Examiner Norwood: Does your statement apply to that 850-A to M?

Mr. Wright: These are offered as invoices, price cards, shipping memoranda, and bills of lading relating to transactions in litharge and red lead by the National Lead Company.

Trial Examiner Norwood: As I understand, Mr.

Ewing made his statement before that Exhibit No. 850-A to M had been mentioned in the record. Does your statement apply to that?

Mr. Ewing: It applies to 850-A to M as well as the other exhibits.

Objection is made on all the grounds on which objection has heretofore been made to the introduction of other invoices and similar documents, without going into the detail of those objections.

Trial Examiner Norwood: Very well. In other words, you object to them on the ground that they are cumulative?

2027 Mr. Ewing: Cumulative and also—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: At earlier stages in this case various invoices, price cards, and other documents have been offered in evidence by the Trial Attorney for the Commission; and from time to time objection on behalf of the Respondent has been made thereto on various grounds.

At times, if my recollection is correct, the Court has extended blanket objection to the line of inquiry under questioning. This time I wish to object to the offer of these documents, consisting of invoices, price cards, and so on, as stated by Mr. Wright, upon all the grounds upon which objection has heretofore been made to other similar documents, without attempting a detailed restatement of those objections at this point in the record.

Mr. Wright: Your Honor, I submit that the documents are admissible for all purposes of the complaint. We have an allegation of fixing of prices, monopolistic pricing; also the allegation of price discrimination.

Without evidence of this sort, the facts cannot be ascertained.

Trial Examiner Norwood: Were those documents brought in pursuant to a subpoena or notice?

2028 Mr. Wright: They were, sir. They were brought in pursuant to a subpoena, which was returned on the 3rd of October, 1946, here in Washington.

I direct your attention to page 1623 of the transcript—

Mr. Ewing: (Interposing.) There is no question about it. I brought them in.

Trial Examiner Norwood: What was required there?

Mr. Wright: Mr. Ewing, correct me if I am wrong. They were returned pursuant to a subpoena, which requested invoices showing sales and shipments of red lead and litharge during the last quarter of 1941 at certain specified destinations; also shipping memoranda and bills of lading showing the transportation charges incurred in the shipments; and some of the material consisting of price cards and price announcements was returned pursuant to a specification of the subpoena requesting price announcements and price cards of the National Lead Company on the dates designated.

Is that correct, Mr. Ewing?

Mr. Ewing: That is, I think, the substance of my recollection. You haven't attempted to cover the detail.

Trial Examiner Norwood: Well, now, I don't know whether the nature of your objection requires me to inspect those documents or not.

Mr. Ewing: I didn't anticipate that it would, be-
2029 cause all similar material has been received in evidence; and I was simply making my objection for the record, as I anticipated you would again receive it.

Trial Examiner Norwood: I understand that when there is to be a study and a compilation of these to show trends in prices and so on, the more invoices you have and the more sales data you have, the more correct will your survey be; so in a case of that kind, you would have to have a good many in order to reasonably judge them cumulative.

We will take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: The documents heretofore referred to and variously marked as Commission's Exhibits for identification from 843 to 850 are received in evidence. Objection is overruled. Counsel will have their exceptions.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 843-A through 843-D; 844-A through 844-D; 845-A through 845-Z-7; 846-Z-7; 846-A through 846-Z-46, 846-Z-47, 846-Z-47½, 846-Z-48 through 846-Z-294; 847-A through 847-Z-284; 848-A through 848-Z-5; 849-A through 849-Z-43 and 850-A through 850-M, were received in evidence.)

Mr. Wright: Your Honor, I request that these docu-

ments be marked as Commission's Exhibits 851-A to B. These documents are photostatic copies of pages 40, 41, 42 and 43 of the Year Book of the American Bureau
2030 of Metal Statistics, 23rd annual issue, 1942-43.

Now, I have asked counsel to stipulate the identification of these documents as genuine copies of the statistics appearing in the document mentioned; and I understand that they are in agreement to so stipulate.

Mr. Ewing: That is correct.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 851-A and 851-B for identification.)

Mr. Wright: Your Honor, I offer Commission's Exhibits marked for identification as Number 851-A and B into evidence as statistics showing uses of lead for various purposes and to show the location of the lead smelting and refining capacity of the United States.

Trial Examiner Norwood: Any objection?

Mr. Ewing: Objection is made on the ground that all or part of the material contained in the exhibits is irrelevant or immaterial. There is no objection from the standpoint of competency.

Trial Examiner Norwood: Anything further?

Mr. Hinds: We have no objection as to competency, but we object on the ground that if the statistics should be accepted as reliable on their face, they don't purport to show facts relevant to this case. It doesn't appear
2031 whether or not oxides that are manufactured by the storage battery manufacturers or others for their own use are included, and it doesn't purport to show in the storage battery industry—which seems to be from these statistics the largest industry using lead products—how much of the products involved in this lead pigment or lead oxide case is included.

The third item there at the top of the second page is "storage batteries, 163,000" in 1934. It is up to 257,000 tons in 1943. Obviously, that is the largest single item, and yet it is not analyzed in the product which is relevant to this case and the product which is entirely irrelevant to this case.

Mr. Wright: Your Honor, I will agree with Mr. Hinds that the figure to which he has called particular attention there under "storage batteries" does not give a breakdown

of the specific poundage or tonnage of so-called oxides which go into storage batteries, because that figure obviously includes metallic lead or antimonial lead, which goes into it, but we know that a substantial portion of that is accounted for by oxides in view of the testimony of numerous witnesses that somewhere between 40 and 50 percent of the lead in a battery is accounted for by oxides.

On the other items, though, it is obvious that there is no such confusion of terms. It gives specific tonnage of white lead and of red lead and litharge used for other purposes than storage batteries.

2032 Mr. Hinds: Is it contended that this includes lead products which are manufactured by the user and, therefore, not the subject of sale in commerce?

Mr. Wright: Well, Mr. Hinds, I can make no contentions other than those which are included in the explanatory notes, which appear on the documents themselves.

Mr. Hinds: Well, are you asking us to stipulate that this document, of which we have stipulated these are copies, has any reliability or any authenticity or is up to date? That doesn't appear in the record.

You have only asked us to stipulate that these are copies of some other documents.

Mr. Wright: I will go further and request a stipulation that the American Bureau of Metal Statistics is a well-known and reliable source of statistics in this field.

Mr. Hinds: We are willing to stipulate that with the qualification that we understand that it does not include the production of black oxides or litharge or other oxides that are manufactured by the users, and that it does not analyze total lead products used in storage battery industry into metallic lead, on the one hand, and its chemical compounds on the other hand.

Mr. Wright: I am willing to accept the agreement with that reservation.

Mr. Ewing: I suggest, Your Honor, that these two 2033 documents have been offered in evidence, and objection has been made to their receipt in evidence; and as far as I understood until the last colloquy between Mr. Wright and Mr. Hinds, we were not asked to stipulate anything except as to the fact that these are correct copies of pages of this particular book. I think that that is all that is before Your Honor at this time, and that is, namely, the objection to the documents.

Mr. Wright: Mr. Ewing, I realize full well that these documents are inadmissible unless there is some concession or some evidence offered that that is a usually reliable source of such information.

Mr. Ewing: I don't think any of us can say whether it is usually reliable or not. I think everybody would be willing to say that is a well-known statistical publication. It is used in the various trades to which it relates. I think everybody would go that far.

Mr. Wright: If that concession will be made by counsel, I am willing to stand on that. Obviously, unless some such concession is made, we will have to prove by testimony that fact. It was implied in my request for agreement, although I inadvertently omitted it.

Mr. Ewing: I think nobody would quarrel with that.

Trial Examiner Norwood: Is it agreed that these papers may come in subject to those qualifications?

Mr. Ewing: No, sir.

2034 Mr. Wright: No, sir. I believe the statement Mr. Ewing made, and to which we have not yet had an agreement, was that this is a well-known publication of the American Bureau of Metal Statistics, which is used in the industry to which it applies.

Now, are counsel willing to agree to that statement?

Mr. Hinds: Yes.

Mr. Gardiner: Yes.

Mr. Ewing: Yes.

Mr. Wright: Counsel indicated their assent.

Trial Examiner Norwood: Received.

Mr. DuBose: Is the objection overruled, Your Honor?

Mr. Ewing: I had an objection that either all or part of the documents in question are irrelevant or immaterial.

Trial Examiner Norwood: Is the objection based on their relevancy entirely?

Mr. Ewing: Relevancy or materiality.

Mr. Hinds: That is my objection.

Trial Examiner Norwood: I will overrule that objection and receive the documents.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 851-A and 851-B, were received in evidence.)

Mr. Wright: Your Honor, there has appeared in the record a statement that the International Smelting &

2035 Refining Company and the Anaconda Copper Mining

Company have gone out of the business of producing lead pigments, and I would like to ask Mr. Serviss, the counsel for Eagle-Picher Company, if he will concede for the record that the plant and appurtenances of the International Smelting & Refining Company in Chicago for the production of white lead have been acquired by the Eagle-Picher Company since that time.

Mr. Serviss: As counsel for Eagle-Picher, we admit that the Eagle-Picher Company acquired the assets, the physical assets of the International Smelting & Refining Company's plant at East Chicago, Indiana. We admit that as a fact, however, we object to the admission of this in evidence on the ground that it is irrelevant.

Mr. Ewing: And on the further ground that it is immaterial, this acquisition having occurred—

Mr. Serviss: On or about October 1, 1946.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I will ask Mr. Wright to comment on the relevancy of that statement.

Mr. Wright: Well, Your Honor, as was stated, I believe by Mr. Gardiner—was that statement on the record or off?

Mr. Gardiner: That was off the record.

Mr. Wright: At any rate, there is a statement 2036 in the record by the International Smelting & Refining Company and the Anaconda Copper Mining Company to the effect that the plant in East Chicago, Indiana theretofore producing white lead, had been disposed of, and that the company was no longer in business. That is the state of the record.

Now, the fact appears that that plant was acquired by the Eagle-Picher Company, another respondent in this case. Certainly that is a pertinent fact in view of the discontinuance by International. It is an important fact in any consideration of problems of competition and monopoly or price discrimination in this case. It is a fact which the Commission should have before it when they are considering this matter.

Mr. Gardiner: If Your Honor please, I think Mr. Wright is somewhat in error as to his statement as to what the record shows.

Mr. Wright: I will stand corrected.

Mr. Gardiner: In that I believe you said that the record shows that the International is out of this business and the property has been disposed of; is that correct?

Mr. Wright: Isn't that what I said?

Mr. Gardiner: Yes.

Mr. Wright: Yes, I said that.

Mr. Gardiner: I don't believe the record shows that. It only shows discontinuance.

2037 May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will be glad to stand corrected as to my statement. The record shows that the International Smelting & Refining Company discontinued the business; but I don't see that that alters my point on it, the fact that they have discontinued the business, and that the plant and assets have been acquired by the Eagle-Picher Company.

Mr. Ewing: It is true that the acquisition of the plant by the Eagle-Picher Company in a general sense may have been of interest to the Commission from the standpoint of competition or monopoly or whatnot, but certainly has no bearing whatever on the issues raised by the amended complaint served in April, 1946, and the answers thereto served shortly thereafter; at which time the amended complaint did not relate and could not relate to any disposition of the assets of International.

Mr. Gardiner: If Your Honor please, as a further objection on the part of the International, there is an implication here, it seems to me, that the Commission is raising certainly some implication that this acquisition was for some purpose material to the Commission's case.

If there is any question as to the disposition of
2038 that property, I think that should be gone into rather than by a mere inference to the fact that a competitor purchased this property. It seems to me that all the facts are pertinent to this, if any.

Certainly from the standpoint of International we object to the admission of any such statement as is attempted to put on the record here now, because it doesn't give the full picture.

Trial Examiner Norwood: I will overrule the pending objection. You may move to strike if it becomes clearer that it has no connection with the other evidence.

Mr. Wright: I would like to have these documents marked for identification as Commission's Exhibits 852-A, B, and C; and 853-A through W.

Trial Examiner Norwood: They will be so marked for identification.

(The documents referred to were marked Commission's Exhibits 852-A, 852-B and 852-C; and 853-A, 853-B, 853-C, 853-D, 853-E, 853-F, 853-G, 853-G-1, 853-H, 853-I, 853-J, 853-K, 853-L, 853-M, 853-N, 853-O, 853-P, 853-Q, 853-R, 853-S, 853-T, 853-U, 853-V and 853-W, for identification.)

Mr. Wright: Your Honor, you requested of certain counsel in this matter that there be prepared and furnished the Commission: One, a list of the manufacturers of storage batteries who purchased lead oxides during the last quarter of 1941, designated by plant or warehouse from which shipped, and whether customer purchased on
2039 less than 5-ton, 5-ton, or carload price basis, and including the destination of shipment; and two, freight rate, truck or rail, carload, or less than carload, applicable to each designation included in "one" above during the last quarter of 1941.

Commission's Exhibits 852-A through C are the exhibits received from counsel for the Glidden Company.

Mr. Hinds: I am willing to let that go in. The letter which counsel has referred to will constitute Glidden's statement with respect to those documents.

Mr. Wright: In view of Mr. Hinds' statement that Commission's Exhibit 852-A, which is the letter addressed to me from Mr. Hinds, will constitute a statement of what the exhibit is I offer same in evidence.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, heretofore marked Commission's Exhibits 852-A, 852-B and 852-C for identification, were received in evidence.)

Mr. Ewing: Commission's Exhibit 853-A to W for identification consists of certain lists or letters or telegrams representing data compiled by National Lead Company from its records, at the request of the Commission's Trial Attorney, and produced here and delivered to him pursuant to that request.

Mr. Wright: That was a similar request to the one
2040 which I read.

I offer Commission's Exhibit 853-A through W in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked Commission's Exhibit 853-A, 853-B, 853-C, 853-D, 853-E, 853-F, 853-G, 853-G-1, 853-H, 853-I, 853-J, 853-K, 853-L, 853-M, 853-N, 853-O, 853-P, 853-Q, 853-R, 853-S, 853-T, 853-U, 853-V and 853-W for identification, was received in evidence.)

Mr. DuBose: Your Honor, may we go off the record just a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, with reference to Commission's Exhibit 481-A and B, the transcript of testimony shows that these documents were produced by the secretary of the American Smelting & Refining Company on January 16, 1945, in New York—transcript page 85—pursuant to specification number 7 on page 5 of that subpoena duces tecum.

At that time counsel for National Lead Company was asked to agree that these records, that this document was that described in the specification of the subpoena; and no such agreement was made.

I would like to ask Mr. Ewing if he will state that
2041 that is a copy of an original letter from an official of the National Lead Company to the American Smelting & Refining Company.

Mr. Ewing: These two papers, which have been marked Commission's Exhibits 481-A and B for identification, comprise a letter from National Lead Company to American Smelting & Refining Company, bearing date of October 31, 1941. It should be noted that the two pages of the letter contain a number of ink or pencil notations. I know nothing about those and make no confession whatever with respect to them, except that I am prepared to say they were not on the letter as originally sent by National Lead.

Mr. Wright: Your Honor, I offer Commission's Exhibit 481-A and B into evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I object on the ground that it is irrelevant and immaterial.

Mr. Wright: Your Honor, with respect to that, the letter sets forth the delivery point to which National was requesting American Smelting & Refining Company to deliver pig lead on their allocation by the Metals Reserve Company. It sets out the delivered price on pig lead at these various

destinations, and as the record shows that prices of these lead pigments are based directly upon the prices of pig lead, it certainly becomes relevant and material.

2042 Trial Examiner Norwood: Objection overruled. Received.

(The document referred to, heretofore marked COMMISSION'S EXHIBIT 481-A and 481-B for identification, was received in evidence.)

Mr. Wright: I now offer into evidence Commission's Exhibits No. 482, 483 and 489, which are documents produced by the American Smelting & Refining Company as contracts and correspondence with Eagle-Picher Company, which were identified on pages 87 and 88 of the record.

Trial Examiner Norwood: We will take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Proceed. Is there any objection to the proffer?

Mr. Serviss: We merely reiterate the objections we made at the time they were introduced for identification, and further on the ground that it is irrelevant to the case.

Mr. Wright: With respect to the identification—

Mr. Serviss: With respect to the identification, we admit those are the documents specified by Mr. Wright.

Mr. Wright: I believe Mr. Wood made a similar admission at the time they were produced by the secretary of the American Smelting & Refining Company as copies of the contracts and correspondence with the Eagle-

2043 Picher Company concerning the purchase of pig lead. Now, as to the relevancy—

Trial Examiner Norwood: (Interposing.) I don't recall those conditions that were made previ usly.

Mr. Wright: These were documents brought in very early in the case when we were operating under a rule that no testimony could be taken on anything but identification, and they were never offered; so there really was no objection on identification at the time, that I recall.

Mr. DuBose: There were objections last June in the New York hearings as to similar documents relating to similar contracts made with the National Lead Company on the ground that this is totally irrelevant to the issues in the complaint, which deal with lead pigments; and what these contracts are, I presume, are pig lead purchases.

Trial Examiner Norwood: Yes.

Mr. DuBose: From A. S. & R. by Eagle-Picher, which seems to us totally irrelevant to any of the issues in the complaint or the amended complaint.

Trial Examiner Norwood: I will overrule the objection and receive the document as marked.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 482, 483 and 489 for identification, were received in evidence.)

Mr. Wright: Your Honor, I now offer in evidence
2044 Commission's Exhibits No. 490, 491 and 492, which are in that order two contracts of the Sherwin-Williams Company with American Smelting & Refining Company, and a letter from the Director of Purchases of the Sherwin-Williams Company to the American Smelting & Refining Company regarding the purchase of pig lead.

These were identified on pages 90 and 92, and were produced by the secretary of the American Smelting & Refining Company under subpoena duces tecum.

Mr. Welch: Sherwin-Williams objects to the admission of Exhibits No. 490 and 491 on the same basis as the objection made by counsel for the other respondents, being entirely irrelevant and immaterial to the issues in this proceeding.

Mr. Wright: Your Honor, for the same reasons that the contracts of American Smelting & Refining Company with the other respondents were relevant and material, likewise the contracts with Sherwin-Williams Company; and this case is very obviously tied up with pig lead prices and terms, and the relations of various respondents with the suppliers of pig lead are important to determine the issues.

Mr. Welch: With respect to the Commission's Exhibit No. 492 for identification it is a photostatic copy of a letter from Sherwin-Williams Company addressed to American Smelting & Refining Company under date of September 9,
1941, and is in no way connected with Commission's
2045 Exhibit No. 490. No. 491 refers to certain other correspondence, which has not been produced, and we submit that it is a totally incomplete segment of some transaction on which we have no details.

I think it is preposterous to try to put in a letter that refers to other correspondence and to a course of dealing and to pick out one letter out of that entire group and introduce it—we submit it is unfair.

Mr. Wright: Your Honor, in answer to that, the subpoena directed to the American Smelting & Refining Company directed them to produce the correspondence with Sherwin-Williams Company relating to their purchases of pig lead. That letter was produced. Now, certainly, the remainder of the correspondence is in the possession of Sherwin-Williams Company. Presumably it isn't in the possession of the American Smelting & Refining Company, since it wasn't returned on the subpoena. It certainly isn't in the possession of the Commission.

Trial Examiner Norwood: Objection overruled. Received.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 490, 491 and 492 for identification, were received in evidence.)

Mr. Welch: Your Honor, I would like to state for the record that the Respondent Sherwin-Williams Company has never been requested to produce the correspond-
2046 ence and resents the implications that they have been and have failed to do so. It is absolutely meaningless.

Trial Examiner Norwood: It is something in your possession.

Mr. Welch: Not in our possession, no, sir, not in the Respondent's possession.

Trial Examiner Norwood: The remainder of the correspondence?

Mr. Welch: No, sir. There is no showing, no proof whatever, that it is; and we have never been requested to produce anything, and we still object.

Mr. Wright: Your Honor, it is obviously part of correspondence which has been back and forth between the American Smelting & Refining Company and the Sherwin-Williams Company.

Mr. Welch: So what?

Trial Examiner Norwood: Maybe I haven't stated my position sufficiently clearly. Now, if the remainder of the correspondence were in the possession of the counsel offering it, then I would sustain an objection to taking a piecemeal bit of evidence when he could offer the remainder: but inasmuch as the remainder is in the possession of the other parties here, or as a matter of fact, is in your possession, I see no hardship in taking in a single letter there.

Mr. Welch: Your Honor, it has not been shown
2047 that that correspondence is in our possession or anybody's possession or even in existence.

Mr. DuBose: Nor any request direct to any respondent in this case to produce that correspondence.

Trial Examiner Norwood: Respondents don't have to have a request to produce that if they want to explain a bit of correspondence here.

Mr. Ewing: But as against respondents other than—

Trial Examiner Norwood: (Interposing) And addressed to another.

Mr. Ewing: (Continuing.) —as against respondents other than Sherwin-Williams, who obviously have no possession of any of the correspondence. It is certainly inadmissible unless all correspondence is brought before Your Honor.

Trial Examiner Norwood: Well, I think—

Mr. Wright: (Interposing) My purpose in offering that is to show a course of dealing between Sherwin-Williams Company and the American Smelting & Refining Company in the purchase of pig lead. That letter in and of itself shows such a course of dealing. It needs no other correspondence. If there is other correspondence, it is in the possession of Sherwin-Williams Company.

Trial Examiner Norwood: It is received as marked. Objection overruled.

Mr. Hinds: May I see that? I haven't had an 2048 opportunity to look at it yet.

(Hands paper to counsel.)

Trial Examiner Norwood: Counsel may have their exceptions. Counsel may enter further objection if he wants to.

Mr. Hinds: I don't see that it concerns us and I have no comment.

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I would like to offer into evidence Commission's Exhibits No. 25, 27, 28, and 29, which were identified as correspondence from the files of American Smelting & Refining Company, produced under subpoena *duces tecum*.

Trial Examiner Norwood: Any objection?

Mr. Ewing: With respect to Commission's Exhibit No. 25 for identification, it appears that this is a photostatic copy produced by American Smelting & Refining from its files of a letter dated February 27, 1906, to the Morton Trust Company, 38 Nassau Street, New York, relating to some stock transactions. There is no signature on the letter, nothing to identify it.

I submit that as far as Respondent National is concerned, it is irrelevant and immaterial under the issues raised by the amended complaint and the amended answers, that it is purely hearsay and not binding on us or any other respondent.

Trial Examiner Norwood: There is a charge in the complaint about National acquiring certain proper-
2049 ties beginning back in 1891.

Mr. Wright: Your Honor, all of these documents relate to the acquisition of the United Lead Company and the properties of the United Lead Company back in 1906; and they also relate to the close cooperation which existed between the American Smelting & Refining Company in that period— One of these documents is initialed by a man who was then an official of the American Smelting & Refining Company, and then, later, an official of National Lead Company.

Mr. Ewing: As far as the acquisition by National Lead Company of the United Lead Company is concerned, that is covered by an admission in the amended answers, also by an admission in the answer, and to that extent these documents would be purely cumulative.

However, to continue, Exhibit 27 for identification is a letter dated March 23, 1946, again produced from the files of A. S. R., again purporting to be a copy of a letter to the Morton Trust Company with no identification with respect to signature, with no identification as to whether it was ever sent or received, purely hearsay as far as the respondents in this case are concerned, and relating, according to its face, to certain stock transactions in which apparently Messrs. Thomas F. Ryan and Daniel Guggenheim were interested.

Commission's Exhibit No. 28 for identification is a
2050 letter on the letterhead of Morton Trust Company dated March 24, 1906, addressed to the Secretary of the American Smelting & Refining Company, relating to certain stock transactions.

Again, it is purely hearsay as far as the respondents are concerned, and wholly incompetent and irrelevant.

The final exhibit, No. 29 for identification, is a photostatic copy of a carbon of a memorandum, apparently, bearing the numerals "3-28" but with no date to indicate a year, bearing typewritten initials, produced from the files of American Smelting & Refining; but again wholly

hearsay as far as any of the respondents in this case are concerned.

I submit that these unrelated or isolated documents relating to transactions over 40 years ago, and incompetent as hearsay, should not be received in evidence in this proceeding.

Mr. DuBose: If your Honor please, no respondent can be bound by the statement made over 40 years ago by someone not a respondent in this proceeding, not addressed to any of the respondents in this proceeding.

Mr. Hinds: And someone who is not produced here for cross-examination.

Mr. DuBose: And not produced by any of the respondents.

Mr. Wright: These documents are not isolated, as
2051 counsel has stated. They fit into other documents which are in the record. They fit into minutes of the meetings of the board of directors of the National Lead Company in that time period, when the United Lead properties were being secured.

These documents were produced as having been in the files of the American Smelting & Refining Company over that period of time and were produced pursuant to the subpoena of the Commission requesting correspondence and memoranda relating to the transfer of the United Lead properties to National Lead Company.

They are ancient documents. We are dealing with a period 40 years ago. The significance of that document is that it ties up Messrs. Guggenheim and Ryan and other parties to that whole transaction, and who also were in large part in control of the American Smelting & Refining Company and who later sat on the board of directors and had a large part in the affairs of the National Lead Company.

Mr. DuBose: If your Honor please, suppose for instance there were produced today a letter from Hammond Lead Company to W. P. Fuller & Sons in San Francisco saying that the five respondents and their subsidiaries in this case were a conspiracy and a monopoly. Would that be admissible? This is on the same ground.

Mr. Hinds: Only worse, because this is 40 years
2052 ago, and we couldn't even bring these people in for cross-examination if we wanted to.

Trial Examiner Norwood: Would it inconvenience you for me to reserve the ruling on this over the lunch hour?

Mr. Wright: No, sir. I believe those documents should be read in the light of the other exhibits which are in the file; namely, the minutes of the meetings of the board of directors of the National Lead Company in that period just prior and just subsequent to those dates of that correspondence. That is a part of the agreement or conspiracy —call it what you will—that was going on at that time between Messrs. Ryan and Guggenheim and officials of the American Smelting & Refining Company and of the National Lead Company to monopolize the entire lead industry, as charged in the complaint.

Mr. Ewing: Your Honor, that is hearsay.

Trial Examiner Norwood: Exhibit No. 25 to the Morton Trust Company— Have you shown who wrote that?

Mr. Wright: The discussion as to these exhibits is contained in the record on pages 58 through 65 when they were produced by the Secretary of the American Smelting & Refining Company pursuant to subpoena.

Trial Examiner Norwood: I will reserve the ruling on this. I have the record in my office and will look at it during the lunch hour.

2053 Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: On September 17, 1946, complying with the request for certain data as to certain transactions, we noted that it wasn't intended by the Commission that all of these transactions—over a thousand or two thousand in number—were contended to involve anything illegal and any discriminations.

They were admitted to have been selected on some other criterion such as time or location, and we noted in a schedule attached to the letter that many of these had involved price changes between the date of the invoice and the fixing of the price; so that they would seem on their face not to have any relevancy, although there was the difference in price.

Then, we asked if there were any others of these numerous transactions which they contend involve price discrimination, and if so, what. So that before we started to prepare our evidence, we would know what case we were being asked to rebut.

I would say that failure to apprise us of that, putting us under the burden of guessing which of so many thousand transactions are contended to be illegal, would de-
2054 prive us of the fair hearing that we are entitled to by statute.

Even though the rules do not provide specifically for a bill of particulars, the definition of fair play and fair hearing certainly requires that respondent shouldn't be put to any such speculation.

Mr. Wright: Mr. Hinds, is your difficulty now with regard to the shifting of the burden to the respondent under section 2-B of the Clayton Act when a price difference is shown? It that the point you are making?

Mr. Hinds: No, where the proof has to do with ascertaining what your claim is. This hasn't anything to do with evidence or information or knowledge. We presumably have evidence, information, and knowledge available to us. It is not in the nature of discovery. The burden of proof is to find out what your claim is so we can meet it. Certainly you can't put in evidence a hundred thousand transactions and ask us to guess which 12 of those 100,000 involve illegality. That is not within the bounds of a fair hearing, a fair trial.

You admit that you have not selected these with reference to their alleged illegality and that you have selected them with respect to some other criterion.

Were you to have the temerity to say that you claim each and every one of these involves an individual
2055 price discrimination, then logically we wouldn't have any complaint, although we might question your sincerity. However, you don't make any such contention. You admit that only a portion, maybe only a small portion, of these are contended to be illegal. You leave it to us to guess which ones are.

That is not fair. That deprives us of our constitutional rights and certainly our statutory rights.

Mr. Ewing: I think what we all have in mind and what Mr. Wright had in mind back in October was that with this tremendous mass of documentary evidence, which is the backbone certainly of the Commission's case, with respect to which none of us have made any real analysis or been in a position to do so up to now, because no one knew what use would be made of it, we have the Commission's case closing.

It seems to us that we are all entitled to know—not maybe to the last dotted "i" or crossed "t" — what charges the Commission now claims at the close of its case it has proved, so as to permit us to meet those charges rather than to come in here at some future date prepared to bring in everything we have got to meet everything we can possibly think of, which would take longer probably than the youngest of us would live.

Then, too, with respect to certain portions of the case as presented against us, you have, as I understand it, a general claim that the system—if you want to call
2056 them systems—or methods, or whatever you want to call them, of selling, constitute in and of themselves on the part of each respondent separate and distinguished from other Robinson-Patman violations.

You have also literally thousands of transactions which may or may not be the subject of Robinson-Patman violation claims.

Now, at this time I can see how it would be asking a great deal of Mr. Wright today or tomorrow or even within the relatively near future to specify each and every alleged Robinson-Patman violation based upon a specific discriminatory situation; but he might be able to outline in a more general way what any such claims are based on, if he is going to make them.

Of course, we don't know, but I think—I know he would like to, but to the extent possible we should be advised, because otherwise, the burden is going to be something terrific.

Mr. Hinds: I would like to put my letter in evidence if the request is to be denied so as to form a basis for objection that we are being deprived of our statutory rights because this letter was dated September 17, 1946, and we did not request that there be any particularization of the general contention that all prices which are the same by
2057 their very sameness violate the Robinson-Patman Act.

We only ask because we will have no difficulty of disposing of that as a matter of law, but in so far as it is contended that differences in prices involve us in the Robinson-Patman Act, that we want to know which differences he relies on.

I would like to offer that in evidence. Do you have the original?

Mr. Wright: Yes, I have the original, but I don't think it is the proper time to discuss that.

Mr. Hinds: I now offer that original that you have, please.

Trial Examiner Norwood: If counsel will hold that to see what statement the Commission's counsel makes, and if it isn't satisfactory to him, he may put the letter in the record.

Mr. Ewing: Let's see what he can do for us.

Trial Examiner Norwood: Yes.

Mr. Wright: With respect to this whole question, I appreciate that respondents would be assisted very greatly by a statement in great detail as to my contentions at this point. I have a problem, too, of course, in that in the first place I have no authority to alter any allegations that are in the complaint, and I don't intend to alter those allegations that are in the complaint and I don't want to be
2058 in the position of making a statement here which would so circumscribe me that my hands would be tied later.

However, I do intend to make a statement with reference to Count 2. I believe that is the count which bothers counsel; is it not?

Mr. Ewing: Yes.

Mr. Wright: Counsel are all very able gentlemen and they have an appreciation of the issues in this matter. A casual reading of the answers is all that is necessary to determine that. Is there any confusion among counsel as to the issues?

Mr. Hinds: We do not make any claim of clairvoyance. If there is any particular transaction that you say violates the Robinson-Patman Act, we say we have not only the ability, but the information and the evidence to meet it, but we are not good guessers and should not be asked to guess about these thousands of transactions.

Mr. DuBose: Your Honor, I think that all of us are agreed that on Count 1 we more or less have a general idea of what you are trying to prove, but we are all worried about Count 2; and if you are worried about being bound by any statement you make, I don't see why if you want to change that statement in the future, I don't see why anyone would object to it. In other words, if you felt that it limited you too much.

2059 However, we want just some general idea of what we are driving at.

Mr. Hinds: May I point out that if this were an ordinary lawsuit—

Trial Examiner Norwood: Wait a minute. Mr. Wright?

Mr. Wright: I see there is a possibility of construction of Count 2 of that complaint so it would be inconsistent, so that the respondents would be caught on the horns of a dilemma where a defense to one aspect of it would be an admission to another aspect; and I hope to clear that up.

Mr. Hinds: That is not what is troubling me. It is which claims we are supposed to meet.

Mr. Wright: Mr. Hinds, I stated this to you before, I believe—once on the record and several times off the record. I have no intention of listing all of the transactions of each of the respondents and saying, for instance, the transaction with John Jones at Cleveland is discriminatory as against certain other specified transactions.

I believe I will be able to describe the transactions by class so that it will be obvious to you exactly what I have in mind.

Mr. Ewing: That is what I meant.

Mr. Wright: I don't know if that will satisfy Mr. Hinds. His request goes much further than that.

Mr. Hinds: What we want to be relieved of is the necessity of looking over each pair of transactions to see whether there is any possibility of there being any difference in price; that we can't see any difference in price in our cursory view stated specifically in this letter, excepting those that we list in a schedule, which we have gone to the work of preparing, where there is an apparent difference, but which is explained by a price change between the date the price was made and the date goods were delivered.

We want to know if there are any others that they claim are individually discriminatory. If there are to be no such claims, that is perfectly satisfactory for the meeting of our request.

Trial Examiner Norwood: I think, gentlemen, that may go over, and we will see what sort of a statement Mr. Wright is going to make. We will see whether this is satisfactory to you, and then we may discuss it further.

As I understand it, you will have no witness for this afternoon; is that right?

Mr. Wright: We have no witness for this afternoon.

Trial Examiner Norwood: Is there any further business we have to transact here with regard to exhibits?

Mr. Wright: No sir; I have nothing further until tomorrow morning.

Trial Examiner Norwood: Pursuant to request of counsel, then, the hearing is recessed until 10 o'clock tomorrow morning.

(Whereupon, at 12:30 p. m., January 7, 1947, the hearing in the above-entitled matter was recessed until 10:00 a. m., Wednesday, January 8, 1947.)

Room 332, Federal Trade Commission Building, Washington, D. C.,
January 8, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 15th Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq. and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

H. E. Gardiner, Esq. and R. H. Ecker, Esq., of the firm of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York City, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Richard Serviss, Esq., American Building, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

John A. Duncan, 165 Broadway, New York City, appearing for the Glidden Company.

2064 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment as of yesterday, the hearing in Docket 5253 is now reconvened for the taking of testimony at 10 o'clock a. m., on January 8, 1947, in room 332, Office of the Federal Trade Commission, Washington, D. C. Please enter the appearances.

Mr. Wright: I request that this document be marked Commission's Exhibit for identification 854-A through D.

(The documents referred to were marked COMMISSION'S EXHIBIT 854-A through 854-D for identification.)

Mr. Wright: Request is made on counsel for the Eagle-Picher Company for the list of customers engaged in manufacturing storage batteries, to whom the Eagle-Picher Company had sold oxides during the last quarter of 1941, the destination to which they were shipped and shipping point from which they were shipped, the price basis on which they were sold and the freight rates involved in the shipments.

Commission's Exhibit 854-A, -B, -C, and -D is a document submitted by the Eagle-Picher Company in response to that request.

Is that correct, Mr. Serviss?

Mr. Serviss: That is correct.

Mr. Wright: I offer Commission's Exhibit 854-A, -B, -C and -D in evidence.

2065 Trial Examiner Norwood: Is there any objection?

Mr. Serviss: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBIT 854-A through 854-D were received in evidence.)

Mr. Wright: A request was made for certain information from counsel for the Sherwin-Williams Company. Mr. Welch, are you prepared to make a statement in that respect?

Mr. Welch: In behalf of Sherwin-Williams Company, I would like to read a statement into the record.

"It is hereby stated on behalf of the Sherwin-Williams Company that it has been the practice of the Sherwin-Williams Company to offer for sale and sell litharge and

red lead in carload quantities, 40,000 and over, on the following basis:

"Litharge, $1.50 per hundred over the New York price of pig lead;

"95 per cent red lead, $2.50 per hundred over the New York price of pig lead;

"97 per cent red lead, $2.75 per hundred over the New York price of pig lead;

"98 per cent red lead, $3.00 per hundred over the New York price of pig lead.

"In selling upon this basis it has been the practice
2066 of the Sherwin-Williams Company to allow or prepay freight to destination.

"The differentials shown on Commission's Exhibit 823-F are for LCL shipments; on carload shipments, if any, of red lead and litharge, the differential is only 25 cents in all differential territories.

"Sherwin-Williams does not do business in these products on the Pacific Coast. Company officials do not now have any information that carload shipments of red lead or litharge are made to any point in differential territories except shipments to Sherwin-Williams' own plants.

"Sales of litharge are confined almost entirely to points in the Chicago area, with a few isolated shipments to Kentucky and Ohio.

"If any carload shipments of red lead or litharge are made into differential territories, they would be scattered sales in those territories shown on Commission's Exhibit 823-F, as the 25-cent differential territories, with no shipments in the 50-cent and 75-cent territories.

"The above statement represents the general practice of the Sherwin-Williams Company over the period of time between the date of Commission's Exhibit 823-C and 823-F."

Mr. Wright: I stated to counsel yesterday that I would make a statement regarding the issues in this matter, and I pointed out at that time I have no authority to amend
2067 the complaint. So that when I speak on this subject, all I can say is what I intend myself to urge in this proceeding as the issues, and I wish counsel would bear that in mind.

I believe it was agreed by counsel yesterday that as to Count 1 there is no confusion with respect to the issues which are involved.

When we come to Count 2, involving the charges of violation of Section 2 (a) of the Clayton Act, paragraph 6 contains a general allegation of violation of Section 2 (a), and I will agree that under that paragraph, conceivably, almost any violation of Section 2 (a) could be found by the Commission.

To a more limited extent, the same is true of paragraph 11, which refers to classification of customers, quantity, trade and regional discounts. However, as to paragraphs 7, 8, 9 and 10 of Count 2, I believe it is clear as to exactly the nature of the allegations. In other words, these allegations relate solely to the discriminations which flow from the use of the zone systems as to these various products, and I don't believe the issues raised by paragraphs 7, 8, 9 and 10 could be more clearly stated than they are in the complaint.

I assume that the confusion which has been stated relates particularly to paragraphs 6 and 11, and that under the provisions of Section 2 (b) of the Clayton Act, and the decision of the Circuit Court in the Moss Case, that counsel may feel that it is necessary that an affirma-
2068 tive defense be submitted as to each of the many, many, many transactions appearing in the record where a price difference is shown. I am aware that the record contains a good many instances of departure from the announced terms and conditions of sale in the customary quotations of the respondents, and of the prices, terms and conditions which I contend were adopted by collusion and agreement. Many of these transactions may involve a violation of Section 2 (a), and may be subject to corrective action by the Commission; however, it is my idea that this case is essentially a price-fixing and monopoly case and that that is the essential charge. And I believe it would be unfair to the respondents and to the Commission, too, to encompass within this proceeding a hundred or more unrelated, really, individual price discrimination cases. Hence, I will state that I do not intend to urge to the Examiner and the Commission that these individual instances of discrimination which do not follow the method and the system of the pattern of the announced prices and terms and conditions of sale of the respondents should be considered within this proceeding.

Now I will state that I consider the discriminations which are alleged in Count 2 to have the effect of eliminating and

suppressing competition between and among the respondents and that certain of the discriminations also have the effect of injuring and suppressing competition in the secondary lines in which customers of the respondent are engaged.

2069 I have no more evidence to offer in support of the complaint and rest the case in support thereof.

I had hoped at this time to be able to submit a complete list of corrections to the record, but I have just not been able to get it prepared. I do not know of any errors which would be prejudicial in any sense to the defense of the case.

Mr. DuBose: I think there are one or two. We can get a list of them. I think perhaps we can agree.

Mr. Wright: I think perhaps in the interim we can work up a list before the respondents offer their evidence.

Mr. Ewing: We can agree and submit our joint corrections.

Mr. Wright: That will be entirely satisfactory to me.

Mr. DuBose: May we have a short recess?

Trial Examiner Norwood: Yes, a ten minute recess.

(Short recess.)

Trial Examiner Norwood: I have studied the record here with respect to this pending proffer, Commission's Exhibits 25, 27, 28, and 29, for identification. I think they might as well be received. The objections are overruled and they are received in evidence.

Mr. DuBose: Is that subject to correction?

Trial Examiner Norwood: Yes, all of them are.

2070 absolutely.

Mr. Wright: In that connection, I submit it has already been corrected.

Trial Examiner Norwood: Yes, the counsel are privileged to include that at the close of the testimony in their motion to reverse rulings, and so on, then it will be much clearer if it is inadmissible.

(The documents referred to marked COMMISSION'S EXHIBITS 25, 27, 28, 29, for identification were received in evidence.)

Mr. Ewing: Your Honor, please, on behalf of all the respondents, except Anaconda and International, we should like to reserve the making of such motions as may seem advisable to us to a later date, say February 25, which will

give us opportunity to make them in a considered form; also an opportunity to determine what corrections we think, if any, should be made to the record, and to take them up with Mr. Wright; and further opportunities to schedule in our own minds a program from the procedural standpoint as to how we can expect to present the defense in this case; and, at the same time, we would propose to make such motions, make the corrections for the record if any, and to present our suggestions with respect to future procedure as far as the presentation of the defense is concerned, if that is agreeable to you.

2071 Trial Examiner Norwood: I think if you are going to make a motion to dismiss, that will delay it still further. If we postpone it to February 27, then you should make a motion to dismiss, that would postpone it another thirty days or so. How about that?

Mr. Ewing: I think during that interim we would need that much time to get ready to actually start with our first hearing—

Trial Examiner Norwood: To find out whether you want to make a motion to dismiss?

Mr. Ewing: Partially that, and partially to collect ourselves. After all, while we had hoped prior to this to have Mr. Wright conclude his case, and he had hoped to, today is the first time that we know it is concluded. And, also, it is the first time that he has been in a position to give us some idea as to what broad general position it is that he will take. We haven't really thought much about it before, because it would have been idle speculation to have tried to determine what was going to happen, what was in his mind, or program. It was my thought, if we had say until—arbitrarily we selected February 27, as the date, it would give us an opportunity to do all these other things in the meantime, then at that time we could fix a date when we start with our hearings. The two spaces of time should give us ample time to make such preparation as is necessary.

2072 Of course, to go over this record and really arrive at a considered conclusion as to how we should present our defenses in the light of the tremendous mass of documents is a substantial undertaking.

Mr. Wright: Do I understand then, Mr. Ewing, that you would want until that date in February to determine whether or not you were going to make a motion to dis-

miss to the Commission, and that then following such a motion, if you had that in mind, there would then be another interval before going ahead?

Mr. Ewing: Following such a motion there would necessarily be an interval of some sort. My thought was that it would really take us, to be in a position to go ahead with an effectiveness, until about April to coordinate what we have and find out what we have got to do. I know you appreciate that because you ran into it yourself when you started to develop the Oxide end of the business and found you couldn't do it right away.

Mr. Wright: I appreciate I am not in any position—

Mr. Ewing: That wasn't a criticism.

Trial Examiner Norwood: I don't know that you can do much of this groundwork between now and the twenty-seventh of February.

Mr. Ewing: We will be doing it.

Trial Examiner Norwood: So that further delays 2073 will be obviated.

Mr. Ewing: We will be doing it. How fast it can be done I am not really in position to say.

Mr. DuBose: After all, Your Honor, the Commission itself, of course, for various reasons had a hiatus in the hearings between May 19, 1945, and June 1946, which was thirteen months.

Trial Examiner Norwood: That makes me all the more anxious to expedite matters so far as I can.

Mr. Ewing: I appreciate that. I also have some appreciation of the magnitude of the task that confronts us. Unfortunately all of us, I can say without contradiction I am sure, can't devote all of our time to this one matter. While we want to be as expeditious as we can, I didn't want to be in the position—that was why we had our discussion—I didn't want to be in the position of standing up today and saying we would like a date, then coming around two weeks from now, three weeks from now, and saying that we couldn't do it. We want to try and determine what we can reasonably expect to do and then be able to stick to it.

Trial Examiner Norwood: Counsel recommends then that we adjourn to February 27?

Mr. DuBose: Why don't we make it the twenty-sixth, Your Honor? The twenty-sixth is Wednesday.

Trial Examiner Norwood: Make it any day counsel

wants. I thought the twenty-fifth was the first date you mentioned.

Mr. Ewing: That is what I intended to mention.

Mr. DuBose: Tuesday, the twenty-fifth.

2074 Mr. Ewing: Before taking that adjournment, if your Honor is going to allow it, Mr. Gardiner, on behalf of Anaconda and International has a motion to make, being a different position.

Mr. Wright: Before that motion is made, I want to say I had no objection to Mr. Ewing's statement. I did want counsel to bear in mind that after that date of the 25th, as expeditiously as possible we get started with whatever evidence respondents planned to introduce.

Mr. Gardiner: If your Honor please, the record shows in Commission's Exhibit 836-A, -B, -C and -L, that the Respondent International Smelting and Refining Company has permanently gone out of the business of the manufacture and sale of lead pigments.

It further shows, rather these Exhibits further show that Respondent Anaconda Copper Mining Company has never been engaged in the business of the manufacture of lead pigments or the sale of lead pigments.

Yesterday, a statement was made on the record to the effect that all of the assets and property of the Respondent International Smelting and Refining Company used in the manufacture of lead pigments had been sold to another Respondent in this matter.

In view of the fact that the Respondent International
2075 Smelting and Refining Company has discontinued the business, has sold its plant, the only plant where it manufactured that pigment, has permanently discontinued this business, has no intention of re-entering it, there doesn't seem to be any purpose why it should be retained as a Respondent in this case, why the company should be placed or charged with the burden of defending the case further, and there seems to be no reason why the interests of the Commission should be furthered by continuing it as a Respondent.

So far as the Respondent Anaconda Copper Mining Company is concerned, it never has been engaged in that business; it has never sold lead pigments; there would seem to be no point in continuing it, assuming that the Commission finds that a cease and desist order should be issued—there is no point in issuing a cease and desist

order against respondents who are being told to do something or not to do something, or do it in a certain manner, that they are no longer doing.

My understanding of the procedure in such matters is that a motion to dismiss is directed to the Commission, the requisite number of copies filed with the Commission, and a copy furnished to the Trial Examiner in the case. That is what we propose to do, if we are correct in our understanding and that is agreeable with your Honor.

I have a motion to dismiss the amended complaint in both cases, rather as to both respondents. These motions are supported by affidavits of officers of the respec-
2076 tive Respondents, reciting the pertinent facts so far as the sale, discontinuance of the business, sale of the plant in the case of the International Smelting and Refining Company, reciting as far as the Anaconda Copper Mining Company is concerned, that it was never engaged in this business.

Trial Examiner Norwood: As to Anaconda and International?

Mr. Gardiner: Yes, sir, as to whether your Honor would like to have a copy of this incorporated in the record—

Mr. Wright: It will be incorporated if it is filed with the Commission.

Trial Examiner Norwood: Yes, it will be filed with the Commission.

Mr. Gardiner: I should like to further say we are filing with the Commission these motions to dismiss the amended complaint as to the International Smelting and Refining Company and Anaconda Copper Mining Company, without prejudice to those two Respondents, that no action will be taken in preparation for the defense of the case as to those two Respondents, until the Commission rules upon those motions. Here are copies for your Honor.

(The said copies are filed with the Trial Examiner.)

Trial Examiner Norwood: Counsel, that last remark there would indicate that counsel was going to want some more time in case his motions weren't allowed. I
2077 think we should have an understanding.

Mr. Gardiner: We will be prepared to move with the rest of the respondents. I meant to say by that, that

we would certainly not be expected to put in any defense until this is ruled on.

Mr. Wright: May I ask counsel, do you intend to request oral argument before the Commission?

Mr. Gardiner: No. No request will be made for that.

Trial Examiner Norwood: Then counsel will file these motions with the Secretary?

Mr. Gardiner: These motions will be filed this morning.

Trial Examiner Norwood: I will retain these two copies.

Mr. Gardiner: Yes.

Trial Examiner Norwood: Is there anything further?

Mr. Ewing: No, sir.

Trial Examiner Norwood: Pursuant to request of counsel, the hearing is now adjourned to reconvene in the Office of the Federal Trade Commission, Room 332, Washington, D. C., at ten a. m., February 25, 1947.

(Whereupon, at 11:04 a. m. an adjournment was taken until 10 a. m. February 25, 1947, Federal Trade Commission, Washington, D. C.)

2078 Room 332,
Federal Trade Commission Building,
Washington, D. C.,
February 25, 1947.

Met, pursuant to adjournment, at 1:30 p. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and Everette MacIntyre, Esq., Assistant Chief Trial Attorney, appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815 15th Street, N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for The National Lead Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), and Richard Serviss, Esq., (American Building, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

2079 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on January 8, 1947, and postponement to this hour by agreement, the hearing in Docket 5253 is now convened at 1:30 p. m., Eastern Standard Time, February 25, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearance of counsel present.

I will say that I have made a new study, and I am delivering to counsel a copy of the synopsis which includes my study of the pleadings. I am going to ask each counsel to criticize it and to give me his written notes on

any parts thereof which he thinks do not sufficiently reflect his answer or do not truly reflect the charge as put down here. In this I have followed the order of the complaint, and used the same denotation except that, of course, those first four paragraphs are simply taken care of in one short paragraph, and the synopsis of the pleadings which would appear in any report or decision that I may hereafter make would be much shorter than this. But I would appreciate your calling my attention to any deviations from what I have indicated here, and also your submitting the issues, what you consider the issues are, raised by this.

Mr. Welch: Do you have a copy for all counsel?

Trial Examiner Norwood: Yes.

2080 If counsel will do that, it would be very helpful in our study of the case, and it will be helpful in taking further evidence, if any is to be taken.

Proceed.

Mr. Ewing: You will recall, Judge, that before we adjourned, I asked the adjournment to this date in order that we might consider what motions, if any, we thought we should make; consider the corrections to the record that we thought should be made; and consider what, in the way of a program with respect to the presentation of the defense, we could work out by this time.

At that time the respondents Anaconda and International Smelting had filed a motion to dismiss on specific grounds, but no other respondent filed any such motion.

After consideration, we have all come to the conclusion that the state of the record required us to make a motion to dismiss on the general ground that there had been a failure of proof, and we will file today with the Commission's Secretary such a motion, with supporting brief and statement, in the requisite number of copies; and in that connection we are asking for oral argument before the Commission.

I am prepared now to supply you with a copy, and supply counsel for the Commission with a copy, and I will supply him with such additional copies as he would

2081 like to have. At the moment, apparently I am down to about the last one.

I should say this, that this motion which I have just handed you, in brief is the motion of the respondent National Lead. The respondent Glidden is filing a similar

motion, and I understand is writing the Commission stating in effect, that as far as a brief is concerned, they are relying upon our brief in order not to add to the Commission's burden. And I understand further that the respondent Sherwin-Williams is doing the same thing, in substance; whereas, the respondent Eagle-Picher is filing a motion and a separate brief, about which Mr. Wood will no doubt have a statement to make.

With respect to the corrections to the record, I have received from counsel for the other respondents a tabulation of their various corrections, which I have put into a composite form. I might say that for all practical purposes they are of relatively little importance; they are typographical errors, obvious mistakes, and so on, and of no serious importance.

I gave Mr. Wright, a few days ago, a copy of some of those. Before we left yesterday our stenographer had not quite finished, and if it is agreeable to Mr. Wright and to you, I would say that I will mail down tomorrow a completed list of both, and subject to approval they
2082 could be filed with the record. Is that agreeable?

Mr. Wright: That is perfectly satisfactory, and I might say that I intend to have a similar list on my part within the next few days.

Mr. Ewing: I am sure that there is no possible chance of disagreement over them.

Mr. Wright: I have discovered none which would alter or affect in any way the proof. They all seem to be very obvious on their face in the record.

Mr. Ewing: The only reason I think it is worth doing is so that at any future time we won't have to make any explanation as to some mistake.

Mr. BuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: My recollection is that at the last hearing I suggested that assuming we made such a motion as we are making, that we would plan tentatively, on the assumption that the motion should be denied, that we would commence putting in our defense in April. Our thought with respect to that is true. Mr. Wright will undoubtedly, I believe, wish to brief a response to these motions; and at some date, over which I certainly have no control, the

Commission, I hope, will grant us oral argument;
2083 and in the belief that those events will occur at a reasonable time prior to the date I am about to mention, it is my suggestion that our hearings be adjourned to April 21, which I believe is on a Monday. If, in the meantime, the motions are decided and denied, and when I say "decided", I mean not just the day before, but within a few days before so as to permit us to go ahead,—we will be prepared to go ahead on that date with testimony, which I contemplate will take about a week at that time.

As we know, the Commission's counsel, for a reason that I suspect—I may be wrong, and don't want to put words into his mouth—has had a series of disconnected, if you want to call it that, hearings, which has meant that he has been able to prepare for his hearings as they came up after greater or shorter adjournments; and I would say that made the presentation of his case simpler from his standpoint, and enabled him to present it in a more concise and better form than otherwise.

We feel that a similar presentation will be of benefit to all concerned in this case, that is, if we had hearings, say, for a week in April, and then a reasonable delay to prepare the next,—I don't mean to string it out, but reduce it and get it in proper form for presentation,—and then go on again, subject to your convenience and the convenience of other counsel. In that way I think that we will be able to reduce the testimony required of us to within a rea-
2084 sonable compass and to a large extent keep the record down.

As I add it up, I would say that since the hearings were commenced in June, which was the first real affirmative presentation of the Commission's case, there have been some 23 days of hearings. I think we might run a little more than that, but that is a pretty good approximation of the time we all think it would take to put in our case, over all; that is, hearing days.

Therefore, I suggest—and, of course, what action the Commission may take with respect to these motions might have an influence, and if it required any further agreement I have no doubt that we could arrive at it—but it would be my suggestion that because the testimony we would plan to offer first would come principally from New York witnesses, with records in New York, that we adjourn subject to the disposition made of the motions, to April 21

in New York, at which time, assuming the motions are denied, we will be prepared to proceed for, as I say, approximately a week with the first part of the defense testimony.

Mr. Wright: Was counsel for Eagle-Picher going to make any statement—

Mr. Wood: (Interposing.) Yes, unless you want to pass on the question of time first.

Mr. Wright: I would rather have some idea about these motions before we come to that point.

2085 Trial Examiner Norwood: Proceed, Mr. Wood.

Mr. Wood: I have three matters, your Honor.

In the first place, I would like to renew the motion which I made at the hearings here in Washington last June, that the Commission supply counsel for the respondents with a list of the discriminations, the alleged discriminations, on which the Commission will rely as violative of Count II.

Now I appreciate the fact that Mr. Wright made a statement on the record at the January hearing, and I do not doubt that he went as far as he could and did as well as he could. But in my opinion it falls short of what is necessary for the respondents to have in order properly to prepare their defense to this very substantial record, which includes over 2,000 pages of testimony and I think 6000 or 8000 pages of exhibits, something of that nature.

I think that I made my position clear before, and I am simply renewing this motion at this time for your Honor to pass on it at this time. That is my first motion.

The second motion has to do with Paragraph Seven-B of the complaint. I was looking this morning at your Honor's first outline of the charges of the complaint as you conceived them, and I find that Paragraph Seven-B of the outline which you gave us just a few minutes ago is a little bit different from the first outline. Frankly, I have been puzzled myself as to the correct meaning of Paragraph Seven-B, but my motion is this, that the Com-

2086 mission particularize as to the date on which the Eagle-Picher respondents commenced the practices charged in Seven-B.

On that Seven-B, your Honor, I think it fairly important from the point of view of the defense to know whether or not Seven-B charges that National cooperated or collaborated with each respondent individually, or whether we are

charged with a group conspiracy. As I read Seven-B, the only charge is that National, whose monopoly is charged in Seven-A, collaborated with each respondent individually. In other words, I read it a little differently from the way your Honor reads it, and I think the difference is of some importance from the point of view of—

Trial Examiner Norwood: (Interposing.) What subsection is that?

Mr. Wood: Seven-B.

Trial Examiner Norwood: "Respondent National agreed with duPont"—

Mr. Wood: (Interposing.) That is Seven.

Trial Examiner Norwood: Oh, yes, I see it.

Mr. Wood: It is right at the bottom of page 2 of your outline.

So I would like to make the motion that the Commission be required to furnish us with a statement as to when the Eagle-Picher respondents commenced the course
2087 therein identified, and also what specific acts Eagle-Picher respondents are alleged to have done.

Those motions are directed to the court.

Trial Examiner Norwood: Is that all with respect to statements required?

Mr. Wood: Yes, your Honor.

Trial Examiner Norwood: Now I will ask Mr. Wright to make any statement he wishes to with respect to those.

Mr. Wright: Your Honor, the matter of the particular transactions, which is the subject of Mr. Wood's first motion, is one that has been discussed at great length by counsel in this matter, both on and off the record, and I don't believe that I can add anything to the statement I made at the last hearing here in January with regard to that subject, as to particular transactions. Certainly the complaint and the answers, and my statement, show an understanding by counsel of the type of transaction which is challenged under Count II, and it is an easy matter, I am sure, for counsel to determine the records of particular transactions that appear in the record involving his client, Eagle-Picher, which fall within those categories.

That motion has been made a number of times before, and I don't think Mr. Wood has added anything to the statements that were made before, and I submit that it should be denied.

2088 Now with reference to Paragraph Seven-B of the complaint, I think the key to that paragraph occurs

in the first sentence of the complaint where it says, "Respondent National has also combined and conspired with" the remaining sellers of lead pigments in the United States. In other words, that paragraph charges a combination and a conspiracy between and among the various respondents, not individual conspiracies each with National.

Mr. Ewing: Might I interrupt you there, Mr. Wright? The language of the amended complaint—this needn't be on the record. I want to direct his attention to it so he may clarify it if he cares to.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: In further connection with the meaning of Paragraph Seven-B, of Count I, the combination and conspiracy charged in the first sentence thereof is by and between National and the other respondents in this matter.

Now as to the specific dates and acts, I believe it is plain from the proof which has been offered in this case exactly the period of the conspiracy which is covered by it. Certainly the evidence introduced in the form of documentary evidence covering the activities of the respondents shows the conspiracy which is the subject of this complaint 2089 to be one which was initiated sometime around the year 1933, and which we contend has been in existence from that time until the present.

Now as to specific acts which might go to make up the proof of that conspiracy, there are so many pieces of evidence which must be fitted together to make up the picture and pattern of the conspiracy that to describe the particular acts would be like briefing the case on the merits, and I don't believe I am required to undertake that at this point.

Mr. Wood: I think I made my question unduly hard. I really wanted to know whether the Eagle-Picher respondents are charged merely with collaborating with National, or whether we are also charged with collaborating with Glidden, with Sherwin-Williams, and Anaconda, each.

Mr. Wright: It is my theory of this case that all of the respondents were engaged in a conspiracy to do the acts which are set forth in Paragraph Seven-B of Count I, and it was a conspiracy by and with each other and for the benefit of all of the alleged conspirators.

Mr. Wood: I would like to say on the record, your Honor, that the statements of Mr. Wright entirely clear

the second point I made in my request for information. That leaves the first question of the information in respect to the discriminations.

Now I didn't try to go beyond what had been pre-
2090 viously said because it has been argued very substantially, and of course we know that the delivered price system in itself is charged to be a discrimination; that the zone system is charged to be a discrimination. I take it that quantity discounts, or at least some of them, are charged to be discriminations, but I don't know how many of them are in respect to how many products. I think there are some functional discounts with respect to white lead in oil. I do not know whether those are charged to be discriminations.

Then there is that tremendous tabulation that was made over a period of several weeks, from the Eagle-Picher invoices.

You see, everything that I have mentioned could have been charged rather simply; but I do not know the significance of that complex tabulation or what that adds to the fairly simple issues that Mr. Wright says I already know. I assume that that complex tabulation has some purpose, and that it wasn't put in simply to make the case look tough, but that the Government has something in mind, and frankly I don't know what it is. And what is more, when I examined the man who made it, he said he didn't know why it was made that way. So I have done everything I can to find out.

Mr. Wright: With regard to the tabulation, I am sure if Mr. Wood will recall the circumstances that attended making it in the first place, it was intended to substi-
2091 tute for the having of thousands of invoices and original records, showing transactions in these products, in the record. It was thought that that would be a much simpler way of having the information at hand.

Now certainly the records of transactions in these products are good evidence of a number of facts that are inextricably bound up in this proceeding, the most important of which are to show the identity of prices by the respondents; and furthermore, to show transactions in which discriminations, as alleged in the complaint, occurred.

May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wood: I would like to state on the record that our reference to the invoices and tabulations of invoices, and our request for specific information in respect to which sets of transactions constitute discriminations, is related solely to Count II, and whatever burden may be on the respondents to defend in relation to Count II; that we are not looking at these documents from the point of view of Count I or charges of conspiracy or charges of collusive action, but merely from the point of view of price discrimination.

I would also like to state on the record that the answers in general admit delivered price selling; they admit zone selling particularly of white lead in oil; they admit
2092 certain quantity discounts.

Now it seems to us that with those admissions in the pleadings, there must be some specific purpose of all of this detailed data if it relates to Count II.

Now if it relates only to Count I, I still think we are entitled to know specifically what discriminations we are charged with, but perhaps we need not be so concerned with the details of the invoices if they relate solely to Count I.

Trial Examiner Norwood: I really think that the statement he made heretofore covers your point there, but let's see what else he has to say.

Mr. Wood: Well, I brought out specifically, for instance, that we do not know whether or not the functional discounts, when utilized, are charged to constitute illegal price discrimination. That is just an example.

Mr. Wright: We have covered this a number of times. I hoped I had cut down on the objection that has been raised to this thing.

Actually, the tabulations themselves are in no way different than the actual invoices. In some instances we have the actual invoices in the record, so that the considerations that would apply to the tabulations would apply to the invoices, and vice versa. The tabulations were solely a time and trouble-saving device that we adopted.

2093 In view of my statement that I made at the last hearing, that we were not going to try numerous price discrimination cases involving deviations by the respondents from what we consider were their regular prices and terms and conditions of sale, as we also consider were

agreed on under Count I, I can't point to a transaction in the record with a customer in Zanesville, Ohio, and another one somewhere in Indiana and state, "Well, that is a discrimination"; whereas, another one is not. Those must be compared, for the purposes of Count II, by the category or class of transaction that is involved, in accordance with the allegations of the complaint.

Mr. Wood: It seems to me that an infinite number of those comparisons is necessary if the respondents are to prepare their defense, and that we ought to have at least sample transactions to crystallize issues in the case.

Trial Examiner Norwood: Wasn't the statement made that there were no price discriminations to be urged against respondents that were not involved in this zone system?

Mr. Wright: No, sir. I consider that the quantity discounts of the respondents are discriminatory, and we have offered evidence, I believe, in the record, showing the injury to competition in the secondary line as a result of those discriminations.

Now the complaint also alleges specifically that the functional discounts are discriminations.

2094 Mr. DuBose: As I get it, Mr. Wright, isn't this true, that your contention is that these invoice tabulations are not primarily going to be used to show individual discriminatory transactions between two individuals located, say, in towns that may be contiguous, in so far as they might not be illustrative of a general system, in other words, of delivered price throughout a zone, of zone pricing, of trade or functional discounts, of regional discounts, and of quantity discounts, all of which are alleged in Count II?

Mr. Wright: That is my feeling in the matter, yes, and I thought that was made clear the last time we met in January.

Trial Examiner Norwood: I thought it was.

Mr. Wood: If your Honor please, we are bound to be confused by this type of situation. Now in respect to the sale of litharge in the battery industry, a great number of days' testimony was taken investigating competitive conditions throughout the Middle Western area. So from that, naturally we know that we are under attack for quantity discounts in respect to that product in that general area.

Now no similar testimony was taken in respect to white lead in oil or in regard to many other products that are

mentioned in the complaint. That is bound to leave us in some confusion to know just how many differentials or how many different differentials we are called upon to at-
2095 tempt to justify.

We are dealing with lead in oil, dry white lead, litharge, red lead, and I think a couple of other minor pigments, all those different products. We have the issue first of all, whether or not the delivered price system itself, let's say, within a zone, is legal; whether the zone system is legal, that is, charging differentials between zones, at least on some of these products. Third, we have the question of quantity discounts, and there are different quantity discounts in respect to all of these different products. Then there is the question of functional discounts.

Now you can see the great number of issues that are possible in the case, and the only testimony relating to conditions in the industry, that is, the effect on competition, was in respect to the battery industry and in respect to the paint manufacturing industry in St. Louis, those two alone.

Are we to assume from that, that those are the two sole issues on the effect of discrimination, or are we to defend on everything I have mentioned?

2096 Mr. Wright: Well, I don't believe Mr. Wood can safely make that assumption. I believe it sounds a little more complicated, the way he says it, than it actually is. Actually we only have three categories of products involved in this case. They are the keg products, as I understand it, and whatever lead pigment is sold in kegs is sold generally under the keg product method of selling. Another is the dry white method of selling; and the third is the oxide method of selling. So that actually there are only three general categories of goods involved in the thing. So that saying there are a great many different functional discounts and quantity discounts involved I believe is making it overly complicated. Now it is my contention that the functional and quantity discounts involved in those methods are discriminatory.

Mr. Wood: I am sorry to make it complicated, but all I ask is for Mr. Wright to make it simple.

Mr. Wright: As Mr. Wood has said, there has been actual evidence of injury to competition in the secondary line only in paint and in the battery field. That is the only direct evidence that there is in the record, that is direct evidence of injury in the secondary line flowing from these

discriminations. However, there is the overall allegation in Count II that all of these discriminations, the functional and the quantity and the regional or zone discriminations,

were engaged in by the respondents for the purpose
2097 and with the effect of eliminating competition be-
tween and among themselves; and I believe the record is plain, from the invoices and the tabulations and the testimony heretofore taken, on the extent to which competition has been suppressed through the medium of these discriminations.

Mr. DuBose: Mr. Wright, is it your understanding that regional discounts referred to in Paragraph Eleven, refer back to the zone method? Is that the regional discount?

Mr. Wright: Where are you reading?

Mr. DuBose: Paragraph Eleven has a sort of omnibus allegation with respect to discriminations resulting from quantity, trade and regional discounts, whereas Paragraphs Nine and Ten talk about the zone delivered price method and practice.

Mr. Wright: I believe that "regional," as it used there, has a larger meaning such as a discount or price difference because of the customer's location.

Mr. DuBose: I see. Which applies both to a uniform delivered price and to the zone method itself?

Mr. Wright: That is right.

Mr. Ewing: Might I ask one question? I understand that when Mr. Wright has made his statements with respect to this Count II problem, he has been saying to us in effect—and we appreciate it—that we don't have to go

through these many thousands of transactions with a
2098 view to finding, if we can, what appear to be cases
of individual price discrimination, and justify them, because certainly if we had to do that we would probably be here until 1960. As I understand it he is directing his charges there, generally speaking, against the functional discounts employed by the respondents, or any of them, in the particular lines of products that are sold, and against the quantity discounts. Now I can see how I can make justification for our functional discounts, shall we say, generally, or our quantity discounts generally, and yet in that I will be perhaps giving no adequate answer to a countercharge based upon a specific transaction. That is a problem, along with these other things that we have mentioned,

that concerns me. I can offer testimony to show why we adopt our functional discounts, or why we adopt our quantity discounts, overall, but that is not to say that in some particular case there might not be a situation which would make my explanation, as I gave it, inadequate. My question of Mr. Wright would be—would he expect us to do more than just attempt to justify the system generally, and are we to anticipate an argument based upon the relatively small amount of testimony offered with respect to the dry white lead and the oxides, as proof of injury to the secondary line? Are we to assume—I won't say assume—are we to take it that only do we have to meet the claim that injury to the secondary line has been proved in
2099 the cases where the testimony has been offered, or do we have to go through the whole field to meet the assumption that the proof in these few instances is proof of injury to the secondary line in all transactions? I don't know whether I make myself clear.

Trial Examiner Norwood: As I read the complaint, what is charged here is the employment of methods and of course these specific instances are evidence as to the methods. There may be two or three of them, there may be just one, or there may be a thousand, but let us not lose sight of the fact that it is the method that is being attacked.

Mr. Wright: That is right. Now I don't want Mr. Ewing to get the idea that an abstract defense to all transactions, for instance, of one respondent, would be an adequate defense in my opinion to particular transactions that are in the record which illustrate the discriminations which are charged in the complaint.

Mr. Ewing: I don't mean to interrupt you, but since you mention it, it brings to my mind difficulty. You say "particular transactions that are in the record which illustrate." Now there may be many thousands of particular transactions in the record, as evidenced by the invoices, to which no attention has been called. I know you don't want us to comb the invoices because everything you have said is to the contrary, but it seems to me that once we can thrash this out as to, generally speaking, what we
2100 have to meet, it is going to save everybody a tremendous amount of work and trouble.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: May we have a five minute recess, Your Honor?

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will be in order.

Mr. Wood: I would like to ask a ruling on my motion and I would like to point out more clearly the purpose of my motion. Now Mr. Wright stated that the charges are general as to certain systems of pricing, but that the justifications must be specific and individual to the transaction. He admitted in his statement in January that the number of transactions which might be involved all told, is tremendous. Now if the generalized defense of the differentials is inadequate as a matter of law, if it is as he states, then we have the burden of specifically defending as many different transactions as the trial attorneys for the Commission may choose to individualize, and certainly under those conditions we have the right to know what individual transactions are in the record which require
2101 individual defense.

Trial Examiner Norwood: Do you have any further statement, Mr. Wright?

Mr. Wright: No, Your Honor. I would like to state that while I said that the charges were general, they do charge particular discriminations of a general category. We have been over this same ground a number of times, both with Mr. Wood and with Mr. Hinds, on similar motions, and I hope that the statements I have made in the past regarding my position as to the allegations of the complaint, and those that we have made today, have sufficiently taken care of the situation.

Trial Examiner Norwood: Well, I think counsel have gone a considerable way towards coming to an understanding of these points at issue, and if they have not been rendered entirely clear I trust that they will become increasingly clear as we proceed, and I feel that it is to the best interests of this proceeding for me to deny the motion at this time.

Mr. DuBose: That is if we proceed after the motions are heard and determined by the Commission?

Trial Examiner Norwood: Yes.

Mr. Wood: Now I will finish my end of it. On behalf of the Eagle-Picher respondents I am filing a motion to dismiss. I have copies of the brief and will file the proper number with the Secretary.

Trial Examiner Norwood: Do you have anything 2102 further, Mr. Wright?

Mr. Wright: Not at this point. I would like to ask if any other counsel have any other motions?

Mr. Welch: Counsel for Sherwin-Williams is going to file with the Commission today its motion to dismiss, not supported by a brief or statement.

Mr. Wright: I have never seen these briefs or motions up to this point, so it is difficult for me to discuss this subject without knowing more about the scope of the motions. Is my understanding correct, Mr. Ewing, that your motion is based on the failure of the proof in support of the complaint to make out a case?

Mr. Ewing: That is correct.

Mr. Wright: Is that true of yours, Mr. Wood?

Mr. Wood: Yes. My brief does not particularly overlap National's brief, but is directed to the same general grounds.

Mr. Wright: Do these motions also raise the principal legal questions involved as to the significance of the evidence to constitute collusion, and the significance of the evidence to establish discrimination under Count II?

Mr. DuBose: Yes, I would say so.

Mr. Ewing: Yes.

Mr. Wood: Yes.

Mr. Wright: May I ask counsel if they are willing 2103 to proceed to a final determination of this matter on the basis of the record as it now stands?

Mr. Ewing: Oh no. These motions are based, just as stated, on the position that there has been a failure of proof so far as the Commission's case is concerned. Now if we are held to be wrong in that we have plenty by way of defense that we want to put in.

Mr. Wright: Then am I right in assuming that they stand on the same relative footing as would a motion for a directed verdict?

Mr. Ewing: Not as a motion for a directed verdict, but as a motion to dismiss at the close of the plaintiff's case.

Mr. DuBose: But they are seriously made.

Mr. Wright: Well, Your Honor, in connection with these motions, which of course are directed to the Commission itself rather than to the Examiner, in accordance with the Rules of Practice, there is nothing we can determine here with respect to these motions, so that the only question that is presented here is whether or not the respondents' request for adjournment until such time as the Commission disposes of these motions, or April 21st, should be granted.

Mr. Ewing: I picked April 21st of course out of my head, in a sense, but I had indicated in January that assuming we made the motions, and assuming that they
2104 were denied, we would be ready to proceed with our case sometime in April.

Trial Examiner Norwood: I was rather shocked at the April 21st request. That is sixty days from now, practically.

Mr. Ewing: Well, my basis for that is this—

Trial Examiner Norwood: (Interposing.) I see that counsel have done a great deal of work in preparing their motions and briefs, and it seems to me that all they have to do is to get the Commission to hear them.

Mr. Ewing: That is correct.

Trial Examiner Norwood: I don't see that it is going to require sixty days.

Mr. Ewing: I have no control over when the Commission is going to hear me, if they are going to hear me. I certainly have no desire to restrict Mr. Wright in the time that he will need to put in whatever answer to us he sees fit, and I have no control over the date, of course, upon which the Commission will decide these motions. It may be that in deciding the motions, whatever the decision may be, the Commission will say something that might affect the nature of the evidence, if a defense has to be presented. As you say, we have put in a lot of work on this; we have put in a considerable amount of groundwork in connection with the defense. But we honestly need that time, and the
reason I picked that date is because it seemed to me
2105 likely—and I may be entirely wrong—that not too far in advance of it there would be a decision, and that we then would be in a position to proceed, having properly prepared to proceed, expeditiously and with a view to keeping the record down to a minimum, so to speak. The date in April is not because I have any notion that I am biting off another sixty days, I am not interested

in that, particularly, and I think Mr. Wright knows that we are not going to try to stall him around.

Mr. Wright: It seems to me that there are really almost two separate proceedings here. One is the motions before the Commission to dismiss the complaint; and the other is the trial of this case on the merits. I believe that it is improper at this time to require the Commission to make a complete determination on the merits of this matter by way of an interlocutory decree, which would require a complete analysis of all the facts and of all the legal considerations in this case, which after all can only be a full-dress rehearsal to a final decision on the matter, unless there has been some grave error in the presentation of the Commission's case. Now this is similar to a motion which is made in court to the judge who is hearing the case. He has heard the evidence, he is familiar with the issues, he is familiar with the proof, he has seen the testimony. In that event it does not require the judge to determine that there has been a prima facie case, or that there has not been, and he can make a summary rul-
2106 ing on it. The procedure which the respondents are following in this matter requires for the Commission a complete trial of this case on the merits, now, and then again later.

Mr. Ewing: No it doesn't.

Mr. Wright: Now I have no objection to the motions, I properly could not have, but I do object to conditioning the resumption of the case against the complaint by the respondents on the disposition of those motions by the Commission. I think the end result of that will be to unduly delay the final determination of this case, and that is a consummation that I devoutly wish, the final determination of the issues in this case, and I hope that counsel are with me in that. I want to say right now that I appreciate very much the cooperation that we have had up to this point by counsel in aiding me in presenting this case. We got the amended complaint out in April; the answers were filed in May; we had our first hearings in June; we had substantially completed the case in November and would have wound it up, wound up the few tag ends, in the early part of December but they were postponed until January. Now back then I advised counsel that we were about to rest the case and requested them to be thinking of their plans for putting on their case in

opposition to the complaint. That has been a good many months ago. I want to say that I stand ready to cooperate with counsel for the respondents in the same way
2107 they have cooperated with me, and if there is anything we can agree on now which will help to speed up the final determination of this case, I wish they would let me know what it is so that we can get together on it if it is at all possible.

Mr. Ewing: As I said before, we are not making these motions with the idea that we are simply playing for time. If we had been playing for time—and Mr. Wright suggested in his remarks that we had cooperated with him—we could have done very differently from what we did, and we would not—as we all did—have gone to thousands of dollars of expense literally to supply the papers that we have and to get them as promptly as we have. These motions are made in the belief that they have substance. Certainly we are entitled to ask the Commission to dismiss a case on the ground of failure of proof, and we are entitled to have a ruling on that, and because we make such a motion it should not be suggested that we are trying to unduly delay the proceedings.

Trial Examiner Norwood: I don't believe counsel said that the delay was intentional. All he said was that that would be the net result.

Mr. Wright: That is correct, Your Honor.

Mr. Ewing: That may be, but we certainly should not be asked to proceed until there has been a ruling, and until we know exactly what form that ruling takes.

2108 Trial Examiner Norwood: I think counsel is right about that and I am going to allow the motion to adjourn until such time as these motions may be heard by the Commission and disposed of. In case the Commission grants the motions and dismisses the case, there will be no further proceedings. But I think that probably the first week in April would be sufficient on this matter and I will simply say that if we find that you need to have more time after that we will be guided by the necessities of the case. It is contemplated here that you are only holding for a week and that you may have to have a little more time after that.

Mr. Ewing: That I don't think is unreasonble because nobody asked or expected or in any way—and I am not saying this by way of criticizing—suggested that Mr.

Wright should have poured through his series of hearings throughout the country day after day and in succession. I said before, I believe, that I think he probably presented his case in more concise form because he didn't do that or attempt to do that. I think that applies also to us and we, too, may have to return the compliment to him by taking a tour of the Middle West and possibly the Pacific Coast.

Mr. Wright: May I ask Mr. Ewing if he is prepared to give me any estimate of the time that will be required in presenting his defense?

Mr. Ewing: I can give you this sort of estimate.
2109 I believe that with a month of hearings—and I am not saying a day to day succession amounting to a month—but I think that with, say, thirty days of hearings we can put in our case as we see it now, but that is just my horseback opinion. As I say, I don't want anybody to think that I am suggesting that we will start on the first of May and sit until the 31st of May and do it, because I couldn't do it that way.

Trial Examiner Norwood: Gentlemen, I will say that I have made all other engagements subject to this case. I want to go into the matter thoroughly here and try to do a good job on it, and I don't want to put it off until late in the Spring. Let's make a beginning the first week in April, and then if you have to have some further time of course you know you are going to get it if it is reasonable for you to have it.

Mr. MacIntyre: If Your Honor please, in addition to the statements that have been made by Mr. Wright concerning his position as trial counsel here in opposing the delays in connection with the taking of evidence on behalf of the respondents pending the disposition of their motions, I desire, on behalf of the Chief Trial Counsel's Division, to voice on the record opposition to any delay in the case based on the pendency of these motions before the Commission, for the Commission's disposition of them.

We think that such delay would not be in keeping
2110 with the present Rules of Practice of the Commission.

Trial Examiner Norwood: Well, they may have the time I said, and if they show a positive necessity for a longer time I will consider such a request.

Mr. Ewing: Mr. Examiner, I haven't a calendar with me but that date you suggested is subject to a prior determination by the Commission, is it?

Trial Examiner Norwood: That is right.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I want to ask counsel, before ruling on this, if these motions have now been filed?

Mr. Ewing: They will be filed today.

Mr. Welch: They are ready for filing.

Trial Examiner Norwood: Have counsel applied for oral argument at an early date?

Mr. Ewing: We are asking for oral hearing at such time as may be convenient to the Commission.

Mr. Wood: I have one point in advance of adjournment, Your Honor, and that is this. I think that counsel for the Commission and counsel for the respondents all agree that the motion which I made with respect to the identification of discriminations, which motion Your
2111 Honor denied, is of substantial importance, that is, both in relation to the defense of this case, and possibly as a precedent in relation to other cases. I would like very much to have that certified to the Commission for hearing at the same time we argue this motion to dismiss.

Trial Examiner Norwood: I don't think it is necessary to do that. We have been elucidating these matters all the way through and to be candid with you I think that Commission counsel has made all the statement that he should be required to make. Counsel have the evidence here, they can study the evidence and read the charges. This charge is against a method and here is certain evidence or certain fragments of evidence, a great many, which will have to be studied. I will have to study them and everybody else will have to study them, and I think counsel should go into that for themselves.

Mr. Wood: As I say, there is a difference between the statements of individual trial attorneys for the Commission and a statement binding on the Commission. Now as I interpret it there is a difference between the opinion or the view of Mr. MacIntyre and Mr. Wright. Maybe I am wrong in that respect. But my point is that the statement of the individual trial attorney is in no wise binding on the Commission, according to Mr. Wright's statement in January. I think it should be.

Trial Examiner Norwood: I don't think it should
2112 be. Now if counsel wants to file his motion with the Commission that is all right, but I do not think that I should certify that question to the Commission. I think that we have made every effort to elucidate on the subject here, and will probably do something further along that line as the case proceeds. The administrative process isn't the same as the court process, and we clarify these matters as we go along, and the next time we meet to take further evidence there will probably be further clarification.

Mr. Wright: May I say to Mr. Wood in answer to his statement that I can't bind the Commission by my statements that that is probably true as far as it goes. However, I can assure Mr. Wood—and I believe Your Honor will bear me out in this—that any statement I make about the issues in this case the Commission would, I am sure, consider binding on itself until it had given the respondents an opportunity to come back or introduce evidence against any other interpretation of the issues of the case.

Mr. Wood: Thank you.

Trial Examiner Norwood: The motion is now for adjournment to the 21st of April. After discussion it has been decided to convene at an earlier date and accordingly this hearing is now adjourned to reconvene on Tuesday, April 8, 1947, at 10 o'clock a. m., Eastern Standard Time, in the Bar Association Hearing Room, 36 W. 44th Street, New York City.

2113 (Whereupon, at 3:25 p. m., February 25, 1947, the hearing was adjourned to April 8, 1947, at New York, N. Y.)

2114 Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 22, 1947.

Met, pursuant to notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., Attorney for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.) appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

Roger Hinds, Union Commerce Bldg., Cleveland, Ohio, appearing for The Glidden Company.

2115 James D. Ewing, Esq., E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2116 PROCEEDINGS.

Trial Examiner Norwood: The hearing will be in order. Pursuant to postponement and due notice served upon counsel, the hearing in Docket No. 5253 is now convened at 10 o'clock, a. m., Eastern Standard Time, in the Trial Room of the Bar Association Building at 36 West 44th Street.

Mr. Welch: Your Honor, may I make a statement off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The appearances are as follows: Joseph S. Wright, appearing for the Federal Trade Commission.

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z DuBose, appearing for the National Lead Company..

We are now ready to receive evidence from the Respondents.

2117 Mr. Ewing: I will call Felix Wormser.

Trial Examiner Norwood: Now, the motions filed for dismissal have been denied by the Commission and that is a matter of record in the case. I suppose there is no necessity for discussing it further.

Mr. Wood: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, please.

FELIX E. WORMSER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. Will you again state for the record your name and address, Mr. Wormser?

A. My name is Felix Edgar Wormser. I live at 1 Acorn Lane, Larchmont, New York and my business address is 420 Lexington Avenue, New York City.

Q. At the present time what is your business?

A. I am secretary-treasurer of the Lead Industries Association.

Q. And how long have you occupied that position?

A. Ever since its inception in 1928.

2118 Q. Prior to 1928, in what business were you engaged?

A. I was a consulting mining engineer.

Q. And how long have you been one?

A. I am a mining engineer by profession. As a matter of fact I am a registered professional engineer in the State of New York. I was educated at the Columbia School of Mines and received my degree there and prior to my position with the Read Industries Association, I spent practically all my time connected with mining activities or in the Army of the United States.

Q. When did you graduate from the School of Mines?

A. In 1916.

Q. Are you connected with any technical society?

A. Yes, sir. I am connected with quite a few technical societies.

Q. Will you give us their names?

A. I am a member and former director of the American Institute of Mining and Metallurgical Engineers and counsellor to the Mining and Metallurgic Society of America; a member of the Institute of Metals of London; a Fellow of the American Association for the Advancement of Science; a Fellow of the American Public Health Association; a member of the American Academy of Political and Social Science; the American Economic Association; the American Institute for Economic Research; the American
2119 Marketing Association; a member of the Society of American Military Engineers; American Society of Agricultural Engineers; American Society for Metals; American Society for Testing Materials; American Statistical Association; Society of Automotive Engineers as an associate member.

I am also a member of the Electro-Chemical Society and the Academy of Political Science. There are a few others but I don't think it is necessary to put those in the record.

Q. Are you the author of any works or books with respect to mining and engineering?

A. Yes. I am the co-author with Mr. J. E. Spurr of the text "Marketing of Metals and Minerals."

Q. Mr. Wormser, I show you a printed copy of Commission's Exhibit 495 for identification and ask you what it is (showing same to witness)?

A. This is a copy of the original constitution and by-laws of the Lead Industries Association dated as of November 14, 1928, the day on which it was organized.

Q. Did you heretofore produce pursuant to subpoena a copy of that constitution and by-laws?

A. Yes, sir.

Mr. Ewing: I offer the exhibit for identification, Commission's Exhibit 495, as Respondent's Exhibit No. 1 in evidence.

2120 Trial Examiner Norwood: Is there any objection to the proffer of the exhibit?

Mr. Wright: I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit No. 1.

(The paper referred to, heretofore marked for identification as Commission's Exhibit 495, was received in evidence as RESPONDENT'S EXHIBIT NO. 1.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing: Q. Mr. Wormser, I show you a printed copy of the document which has heretofore been marked as Commission's Exhibit 496 for identification, and ask you what that is (handing same to witness)?

A. This is a revision of our constitution and by-laws revised as of January 19, 1934.

Q. And did you heretofore produce pursuant to subpoena the document which was marked heretofore Commission's Exhibit 496 for identification?

A. Yes, sir.

Mr. Ewing: I offer this in evidence as Respondent's Exhibit No. 2.

Mr. Wright: While I did not object to the previous exhibit, I will object to Exhibit 496 and say that they are irrelevant to the issues in this matter. The Lead Industries Association is not a party to the case and by no

2121 stretch of the imagination can I see that the constitution and by-laws of the association affect any of the issues involved.

Trial Examiner Norwood: They received honorable mention in here.

Mr. Ewing: They certainly did. The Lead Industries Association is charged with at least one of the mediums through which the conspiracy was carried out and it seems to me that we are entitled to show what the association was and how it operated.

Trial Examiner Norwood: It will be received as Respondent's Exhibit No. 2. Objection overruled.

(The paper referred to, heretofore marked for identi-

fication as Commission's Exhibit No. 496, was received in evidence as RESPONDENT'S EXHIBIT NO. 2.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a printed copy of a document heretofore marked as Commission's Exhibit 497 for identification, and ask you what it is (showing same to witness)?

A. This is a revision of our constitution and by-laws as of September 10, 1941.

Q. Was the document heretofore marked Commission's Exhibit 497 for identification produced by you pursuant to subpoena in this proceeding?

2122 A. Yes, sir.

Mr. Ewing: I offer the document Exhibit 497 for identification in evidence as Respondent's Exhibit No. 3.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: The same objection as to lack of materiality and relevancy.

Trial Examiner Norwood: It will be received as Respondent's Exhibit No. 3. Objection overruled.

(The paper referred to, heretofore marked for identification as Commission's Exhibit No. 497, was received in evidence as RESPONDENT'S EXHIBIT NO. 3.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I hand you the document which has been marked as Respondent's Exhibit No. 3 and direct your attention to article 6 relating to membership. Have you read the section?

A. Yes, sir.

Q. Will you state whether membership in the association includes individuals or companies engaged in the business of mining lead?

A. Yes, sir.

Q. Does it include companies or individuals engaged in smelting or refining lead?

A. Yes, sir.

Q. Does it include companies or individuals en-

2123 gaged in the manufacture or production of various lead products?

A. Yes, sir.

Q. I notice that article 6-A refers to lead ore and lead

concentrates. Will you state the differences between lead ore and lead concentrates?

A. Well, lead ore and lead concentrates are distinguished by the fact that lead ore is a mineral or a material which contains lead in sufficient quantity to make it commercial. Now, the ore may be rich enough to be smelted directly such as the specimen I have here (illustrating) which you can see is rich enough for the purpose, or it may be so low grade that it has to be concentrated in order to provide a product that is rich enough for smelting.

So that lead concentrates I would really consider a material that is an ore that has been mechanically treated so as to make it rich enough for smelting.

Q. Who produces lead concentrates?

A. Lead concentrates are produced by mining companies all over the United States.

Q. Will you tell us what the term "lead smelting" means?

A. Lead smelting is the art of extracting metallic lead from ores or concentrates.

Q. And how is that done?

A. That is done generally by fire methods which is a rather interesting procedure. An ore such a this 2124 would be a direct smelting ore, but in any event the sulphur is removed generally by roasting operations and then the sintered product is put in the blast furnace and by appropriate fluxing and the mixture of fuels, you get a crude bullion which it tapped from the blast furnace.

Mr. Wright: I would like to inquire if counsel for the Respondents are calling Mr. Wormser as a mining engineer and expert to testify with regard to these products?

Mr. Ewing: Yes, in this connection. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Complete your answer, Mr. Witness.

The Witness: Well, that briefly is the smelting operation.

By Mr. Ewing:

Q. Now, will you tell us what is the operation of refining?

A. Well, the product derived from blast furnace operations is used. It contains silver and perhaps some an-

timony and gold and other metals. And, of course, these impurities have to be removed and refining is the art of removing the impurities so as to leave a residual commercial pig lead.

Q. What is lead bearing scrap?

2125 A. Lead bearing scrap may be any kind of waste material derived from the use of a lead product such as a storage battery which furnishes the largest single source of scrap in the United States.

Q. You mean worn-out storage batteries?

A. Yes, worn-out storage batteries.

Q. What are extruded lead products?

A. The term "extruded lead products," applies to items such as lead pipe which are extruded in a machine more or less like spaghetti is made.

Q. What is antimonial lead?

A. Antimonial lead is an alloy of lead plus varying amounts of antimony.

Q. What is metallic antimony?

A. Metallic antimony is an element of nature.

Q. When you speak of metallic lead products, what do you mean?

A. By that I mean any lead product, pure or alloyed with other material that is commercially used today in industry such as lead pipe or solder or lead sheet or grid metal in storage batteries or type metal.

Q. Will you tell us, Mr. Wormser, generally how the lead industry operates from the mine to the ultimate consumer?

A. Yes, sir. The lead industry is fundamentally dependent upon mining operations in the United States

2126 and other parts of the world. The ore has to be found, in the first place, which involves a high degree of risk; the mines have to be developed and the ore then has to be produced and concentrated in the concentrating mill generally or sometimes, as I stated before, it may be rich enough to ship to a smelter.

It has to be shipped to the smelter where it is converted to a crude boullion and then it has to be shipped to the refinery to be refined and then the refined lead, which may be one of several commercial grades, is shipped to the various users. Each user in turn specifying what every grade may suit his own particular requirements.

The grades are of varying commercial purity and pig-

nent producers, for example, demand a lead of very high impurity. Capable companies demand an impurity in it. Now, the battery companies require a pure lead in some cases but in other cases they may actually have an antimonial lead made for them.

So that in the final analysis, the refiners attempt to provide the industry with the kind of lead which would best serve their requirements. That is a brief description.

Q. Mr. Wormser, will you give us the geographical location of the principal lead mines in the United States?

A. Well, the largest source of lead in the United States is in Missouri where the ores are of a very low grade, but very important. The entire Rocky Mountain area
2127 from Colorado west contains lead mines. That applies to Colorado, Nevada, Utah, Idaho, California, Oregon, Washington and there is hardly a state in the west that doesn't have some lead mines.

The three largest sources of supply are Missouri, Utah and Idaho. Just offhand I would say that perhaps 75 per cent or 80 per cent of our domestic lead supply comes from those three states.

Q. Where does the principal production come from in Missouri?

A. The principal production from Missouri comes from Southern Missouri, in the so-called lead belt which is just south of St. Louis. They have derived some lead from the Joplin area which is the southwestern area, but essentially that entire southwestern belt is a zinc producing area; it is known as the tri-state zinc area and the lead recovered there is known as a by-product. In fact it takes eight tons of zinc to recover one ton of lead.

Q. Will you give us the geographical location of the principal smelters and refineries?

A. The principal smelters are—lead smelters, that is—are located from coast to coast. There are two, as a matter of fact, in Jersey. There is one in San Francisco which covers the far coast and there is one in Northern Idaho and there is another one in East Helena, Montana.
2128 There is one, or there was one in Chicago. There are—would you like them segregated into refineries and smelters?

Q. All right.

A. In some cases both operations are conducted in one spot but in other cases they are separated. I can give it to you either way you prefer.

Q. Well, you might state the refineries separately.

A. Well, to continue, there are three smelters in the Salt Lake Valley and I didn't indicate those. There is another lead smelter in Texas and also there is a refinery there. There is a refinery in Omaha. I think I have covered all—I am sorry—I have omitted one of the largest ones at East Alton, Illinois. There is a large one there, as well as at Herculaneum, Missouri. There is another one at Helena, Kansas. I think that covers them all.

Q. Have you covered the refineries?

A. Yes, sir.

Q. Is there a smelter in Chicago, do you know?

A. There is a smelter at East Chicago, Indiana.

Q. Is there a refinery in Chicago?

A. There is a refinery or two refineries, as a matter of fact, at East Chicago.

Trial Examiner Norwood: Do those two refineries belong to different companies?

The Witness: Yes, sir; they belong to two dif-
2129 ferent companies.

Trial Examiner Norwood: What are they, do you know?

The Witness: One is the Eagle-Picher Company and the other is the United States Smelting, Refining and Mining Company.

By Mr. Ewing:

Q. Do you know, and if so will you so state, the location of the principal producers of lead pigments?

A. The location of their plants I presume; is that right?

Q. Yes.

A. The plants are located in Newark, Newark and Perth Amboy, in Scranton, Pennsylvania—

Mr. Wright: Your Honor, I object to that testimony from this witness. He is testifying as an expert here on the location of the plants operated by these Respondents who are represented here.

Mr. Ewing: He is testifying as to the fact because I asked him if he knew the physical location.

Trial Examiner Norwood: Let him finish.

Mr. Ewing: Excuse me, I thought he had.

Mr. Wright: I don't think it is proper to bring out that evidence through this witness since there has been no proper foundation laid for his knowledge.

Mr. Ewing: If he knows where plants are phys-
2130 ically located—

Trial Examiner Norwood: He can state anything he knows. Testify from your own knowledge and if you are refreshing your memory from something, we want to know what that is and counsel, in support of the complaint, should be permitted to examine that.

Mr. Wright: Were you reading from something to refresh your memory?

The Witness: Just before the hearing I put down the locations that I had remembered with little pencil notations. Would you like to see this?

Trial Examiner Norwood: You made that yourself?

The Witness: Yes, that is my own writing. You are welcome to it.

Mr. Wright: What was the source of the information, Mr. Wormser?

The Witness: My own memory. I didn't want to rely entirely on my own memory on the stand so I put it down on a little piece of paper.

Trial Examiner Norwood: Proceed. Objection overruled.

The Witness: I believe I mentioned Jersey, Pennsylvania, Philadelphia and Scranton. In Illinois, there is Chicago and then at Hammond, Indiana and St. Louis,
Cincinnati, Oakland, California. I think that about
2131 covers them all.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. In your answer as to the location of these plants producing lead pigments, you were not attempting to give us the complete list; is that right?

A. No, sir.

Q. You have heretofore produced, and there has been marked as Commission's Exhibit 498-A, a list of the members of the Lead Industries Association in the years 1929, 1930 and 1931, of which I show you a copy and I ask you in reading this—simply the names of the companies—to identify each member company by the type of business that it is in.

Trial Examiner Norwood: Is that already in evidence?

Mr. Ewing: That is already in evidence.

Trial Examiner Norwood: What is the exhibit number?

Mr. Ewing: Commission's Exhibit 497-A.

The Witness: The Humada Lead Company was a lead company which I believe is now defunct, which formerly mined lead in the State of New Mexico. The American Metal Company is a lead mining company, a lead smelting and refining company and makes a few manufactured lead products.

Mr. Wright: May I inquire as to whether the wit-
2132 ness is testifying as to the dates of that exhibit at the time these companies were members, or as of the present time?

Mr. Ewing: As of the date of the exhibit. Some of these companies, of course, have been members continuously, and we are going to bring the membership down to date.

The Witness: The American Smelting and Refining Company operates mines, smelters, refineries and manufacturing operations. Anaconda Lead Products Company is a producer of lead pigments. Andrews Lead Company is a manufacturer of lead products, both metallic and pigments. The Bond Manufacturing Company is a producer of collapsible tubes. Bunker Hill and Sullivan Mining and Concentrating Company is a mining company, smelting and refining.

Cerro de Caspo Company is a lead mining, smelting and refining company, operating in South America. Chief Consolidated Mining Company is a lead mining company in Utah. The Eagle-Picher Lead Company is a lead mining, smelting, refining and manufacturing company.

El Potsi Mining Company is a mining company operating in Mexico. The Houston Lead Company, producing white lead in Scranton, Pennsylvania. Evans Lead Company of Charleston, West Virginia, producing lead oxides. Federal Mining and Smelting Company operating a lead mine in Northern Idaho. Federated Metals Corporation
is a producer of various metallic lead products. Fleck
2133 Brothers Company, of Philadelphia, are producers of plumbing goods made of lead. W. P. Fuller and Company is a manufacturer of paints and various lead pigments.

General Lead Manufacturing Company of Denver, Col-

orado, producing metallic lead products and mainly going into plumbing. Hecla Mining Company of Idaho is a lead company. International Smelting Company and United Metals Selling Company Agents, operating a smelter in Idaho and a refinery in East Chicago, Indiana. The Lewin Metals Corporation of St. Louis, a smelter of secondary or scrap lead. Metals Refining Company of Hammond, Indiana, producing lead pigments and metallic lead products.

The National Lead Company, engaging in mining to a limited degree, smelting and refining and the manufacture of lead products, both metallic and in pigment form. North West Lead Company, producing manufactured metallic lead products in Seattle, Washington. Park-Utah Consolidated Mines Company is a lead mining company in the State of Utah.

The Remington Arms Company of Connecticut is a manufacturer of ammunition. The Rochester Lead Works is a manufacturer of lead plumbing goods. The St. Joseph Lead Company, operating lead mines, a smelter and refinery in Missouri. Sherwin Williams Company is a paint company, manufacturing also lead pigments. Silver
2134 King Coalition Mines Company is a lead mining company in Utah.

Tintic Standard Mining Company, that is another mining company in Utah. United States Smelting, Refining and Mining Company has leased mining operations in the western part of the United States and also operating a smelter and refinery. U. S. L. Battery Company, operating a storage battery plant in Niagara Falls. Winchester Repeating Arms Company, a manufacturer of small arms and ammunition in Connecticut.

Trial Examiner Norwood: Do they produce any of the lead?

The Witness: No, sir. They have to buy it in the open market, sir.

Trial Examiner Norwood: Do they do any refining or anything like that?

The Witness: They do no refining, sir.

Trial Examiner Norwood: All right, proceed.

By Mr. Ewing:

Q. I show you a copy of Commission's Exhibit 498-B, which is a list of the members of the Lead Industries Association in 1932, and direct your attention to those

names noted by a pencil cross and ask you to give us the nature of the business of those companies (showing same to witness).

A. The Crown Metal Company of Milwaukee, Wis-
2135 consin, is a manufacturer of lead products. The Globe Metal Company manufactures various metallic lead products. The Hudson Smelting and Refining Company is a smelter and refiner of scrap lead. Nathan Trotter and Company are merchants in pig lead and lead alloys. The National Bearing Metals Company are manufacturers of railway and other bearings made of lead.

Q. What is the United American Metals Corporation?

A. The United American Metals Corporation is a producer of various metallic lead products such as type metal and tube metal and various items.

Mr. Wright: May I inquire at this point of counsel whether these questions are being asked of the witness as an expert or as facts of his own knowledge?

Mr. Ewing: Facts of his own knowledge.

Mr. DuBose: As secretary of the Lead Industries Association for 19 years.

Mr. Wright: Thank you.

By Mr. Ewing:

Q. I show you copies of Commission's Exhibit 498-C and D covering membership in the association for 1933, and direct your attention to those names noted by the cross and ask you to tell us the business of those companies (showing same to witness).

A. The Alpha Metal and Rolling Mills manufac-
2136 tures various metallic lead products in Brooklyn, New York. The Balbach Smelting and Refining Company was a smelter and a refiner of lead. The Cambridge Smelting Company manufactures metallic lead products in Cambridge, Massachusetts. The Columbia Smelting and Refining Company manufactures metallic lead products in Brooklyn, New York.

The Dayrock Mining Company is a mining company in Wallace, Idaho. The Division Lead Company of Chicago, Illinois, manufactures metallic lead products. The Flemm Lead Company manufactures metallic lead products in Long Island City. The Gardiner Metal Company of Chicago, Illinois, manufactures metallic lead products. The Girard Smelting and Refining Company was a smelter of secondary or scrap lead.

Goldsmith Brothers Smelting and Refining Company of Chicago, Illinois, operate a secondary lead smelter and refinery.

Mr. Wright: Your Honor, I object to so much of this testimony as is in the present tense. It is irrelevant and immaterial that these various people operate at the present time.

Mr. Ewing: He may be answering it in the present tense, but as I understand it, his testimony is giving the business of these companies as of the year.

Mr. Wright: The witness has not so testified.

2137 Mr. Ewing: When you raised that before, I thought he made it clear.

Mr. Wright: When I raised it before, counsel answered it but the witness has not made that clear.

Trial Examiner Norwood: I will ask the witness if he is answering it as of the time of the exhibit there?

The Witness: That is what I am trying to do, sir.

Trial Examiner Norwood: You may do that. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Complete your answer.

The Witness: Hammond Lead Products, producing oxides in Hammond, Indiana. Hercules Mining Company, a lead mining company in Idaho. Imperial Type Metal Company, producing type metals in Philadelphia, Pennsylvania. The Johnston Tin Foil and Metal Company, producing lead foil in St. Louis. Marks, Lissberger and Son, producing various metallic lead products in Long Island.

Nassau Smelting and Refining Company, operating a secondary smelter in Staten Island. North-Western Metal Manufacturing Company, operating a secondary smelter and producing various metallic lead products in Minneapolis.

By Mr. Ewing:

Q. I show you a copy of a document which has
2138 been marked Commission's Exhibit 498-E, being a list of the members of the Lead Industries Association in 1934, and ask you to state the business of the two companies marked with the pencil mark of "x" on that list as of 1934 (showing same to witness).

A. In 1934 the Dickson Weatherproof Nail Company manufactured lead covered nails. In 1934 Kahn Brothers Smelting and Refining Works produced some lead from scrap operations and some metallic lead products.

Q. I show you a copy of Commission's Exhibit 498-G, listing members of the Lead Industries Association in the years 1937, 1938 and 1939, and I direct your attention to the five noted by crosses and ask you to state the business of those five companies (showing same to witness).

A. In 1937, 1938 and 1939, the Baker Lead Manufacturing Company manufactured lead plumbing goods in Worcester, Massachusetts. The Division Lead Company manufactured metallic lead products in Chicago, Illinois. The Electric Auto-Light Company manufactured storage batteries in Toledo, Ohio. The General Lead Manufacturing Company manufactured metallic lead products in Denver, Colorado. The Kansas City Smelting Company manufactured metallic lead products in Kansas City, Missouri.

Q. I show you a copy of Commission's Exhibit 498-H, listing membership in the Lead Industries Associa-
2139 tion in 1940 and 1941, and direct your attention to the three marked by crosses and ask you the nature of the business of those three companies (handing same to witness).

A. In 1940 and 1941, John R. MacGregor Lead Company manufactured white lead in Chicago, Illinois. The Vulcan Lead Products Company manufactured metallic lead products in Milwaukee, Wisconsin. And the Wensley Metal Products Company manufactured metallic lead products in Denver, Colorado.

Q. I show you a copy of Commission's Exhibit 498-I, listing the membership in the Lead Industries Association in May 1942 and ask you to give us the nature of the business of the three companies on the list marked by "x".

A. In 1942 the Ethyl Gasoline Company manufactured Ethyl lead in Newark and Louisiana. The Pittsburgh White Metal Company of Brooklyn, New York, manufactured type metal and other alloys.

Q. I show you a copy of Commission's Exhibit 498-J, listing membership in the association in May 1943, and ask you to give us the nature of the business of the one company identified by the "x".

A. In 1943 the Lewin-Mathes Corporation produced pig lead from scrap metal.

Q. I show you a copy of Commission's Exhibit 498-K, listing membership in the association in May 1944,
2140 and ask you to give us the nature of the business of the five companies marked on the list with an "x" (showing same to witness).

A. The Firestone Tire and Rubber Company is a manufacturer of lead storage batteries and, of course, an important manufacturer of tires and automobile accessories. The Mike Horse Mining and Milling Company is a lead mining operation in Montana.

The New Park Mining Company is a mining company in Utah. The Shattuck Den Mining Corporation operates lead mines in Arizona. The Western Electric Company is a manufacturer of lead covered cable among other telephone appliances, and has various plants in the United States.

Q. I notice that on a number of these lists of membership there is the notation "associate member." Will you tell us the distinction, if any, between regular members and associate members in the association?

A. The only distinction between associate and regular membership is that the associate members do not have a vote. That was brought about by the fact that in NRA days we were requested by the NRA to amend our constitution and by-laws so as to limit our regular membership to certain industries. That excluded some industries who were greatly interested in the work that we were doing, for example, storage batteries or cable manufacturers.

But they were eligible to become associate members
2141-2142 and they were granted associate membership on that occasion.

Mr. Ewing: May I suggest a short recess, your Honor?

Trial Examiner Norwood: We will take a five-minute recess at this time.

(Whereupon, a short recess was taken.)

2143 Trial Examiner Norwood: Come to order, please. Proceed.

By Mr. Ewing:

Q. I show you copies of Commission's Exhibits 499-A to H inclusive listing members of the Board of Directors of the Lead Industries Association in certain years and of the Executive Committee and officers, and ask you to identify from the standpoint of the principal business of

the company the various representatives (showing to witness) by name?

A. Mr. Zimmer, mining, smelting and refining of lead; Mr. F. H. Brownell, mining, smelting, refining of lead and the manufacture of lead products; Mr. Glass, the sale of pig lead; Mr. Easton, mining, smelting and refining of lead; Mr. Bendealari, mining, smelting, refining of lead and the manufacture of lead pigments and metallic lead products; Mr. Schaefer, manufacturer of tetra-ethyl lead; Mr. Newhouser, a manufacturer of metallic lead products and a smelter and refiner of secondary lead; Mr. Hanley, mining of lead in Idaho; Mr. Sprague, manufacturer of paint and a producer of lead pigments; Mr. Rockwell, smelter and refiner of lead and a producer of metallic lead products and lead pigments; Mr. Friendly, mining of lead; Mr. Crane, mining, smelting and refining of lead; Mr. Ivers, mining of lead; Mr. Wade, mining of lead; Mr. Colcord, mining and smelting of lead.

Q. What was the principal business in which Mr.
2144 Reitler, Mr. Ivan Reitler was engaged?

A. The conversion of secondary lead into pig lead and the manufacture of various metallic lead products.

Mr. Wright: Your Honor, I object to further testimony on these exhibits along this line. It is all cumulative. These companies were all in the lists that were described heretofore in the testimony regarding exhibit 498.

It is simply cumulative as far as I can see.

Mr. Ewing: I want to show the representation on the Board and the Executive Committee at any particular time as shown by these exhibits. It is true that you may be able to get the information if you search around through other parts of the record but I would like to have it in an exact form.

Mr. Wright: Your Honor, it has just been testified to under the membership. Now all of these people who were directors were presumably members of the association and the business of all the members has been described in full here this morning.

Now we are apparently going ahead and redescribing the business of those people who are already in the record shown to be or have been directors of the association at that time. It is simply cumulative.

Trial Examiner Norwood: I think he is giving us
2145 some further particulars there. In a general way it is understood that everyone on that membership list

has something to do with the production and sale of lead or lead products.

But, as I understand it, he is bringing out those who manufacture or produce or mine lead as distinguished from some of these battery manufacturers or some of these ammunition sellers or others who are on the list.

Mr. Wright: This same testimony about these same companies has been given not ten minutes ago.

Trial Examiner Norwood: What have you to say?

Mr. Ewing: My point is that you have this list of names of particular individuals. Now if you go to the list of companies and then go to his testimony you can tie up eventually what business these particular men were in.

The purpose of my questions now is to identify Mr. Brownell specifically as being a representative of a producer, smelter and refiner serving on the Board of the Lead Industries Association for clarification.

Mr. Wright: The exhibit itself shows, for instance, that Mr. Brownell is the chairman of the Board of the American Smelting and Refining Company. I assume that the witness' testimony is not what Mr. Brownell does but what the American Smelting and Refining Company does, and he has just testified within the last hour what the
2146 American Smelting and Refining Company's principal business is.

Trial Examiner Norwood: I will ask the counsel to confine himself to the additional information that would broaden the information that we already have. I think he should have some latitude as to what he wants to show here. I will overrule the objection here.

Mr. Ewing: It is simply to have a ready way of picking these things out and putting them together.

Trial Examiner Norwood: It may save us some work in searching the record. Objection overruled.

By Mr. Ewing:

Q. You answered the question with respect to Mr. Reitler?

A. Yes, sir.

Q. What was the principal business represented by Mr. J. F. McCarthy?

A. The mining of lead.

Q. What was the principal business represented by Mr. P. E. Sprague?

A. The production of paint and the manufacture of lead pigments.

Q. What was the business represented by Mr. F. N. Carter?

A. The principal business would be the manufacture of metallic lead products and lead pigments, I would say.

Q. What was the principal business represented by Mr. B. Montferry?

2147 A. The mining of lead.

Q. What was the principal business represented by Mr. R. S. Reynolds?

A. The manufacture of foil.

Q. What was the principal business represented by Mr. F. Y. Robertson?

A. The mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. B. Y. Hunt?

A. The manufacture of lead foil.

Q. What was the principal business represented by Mr. R. M. Roosevelt?

A. Mining, smelting, refining of lead and the manufacture of lead pigments and metallic lead products.

Q. What was the principal business represented by Mr. G. W. Lambourne?

A. The mining of lead.

Q. What was the principal business represented by Mr. H. M. Brush?

A. The mining and smelting and refining of lead.

Q. What was the principal business represented by Mr. F. A. Easton?

A. The mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. E. J. Cornish?

2148 A. The manufacture of metallic lead products and lead pigments.

Q. What was the principal business represented by Mr. A. A. MacLean?

A. The manufacture of storage batteries.

Q. What was the principal business represented by Mr. R. C. Swanson?

A. The manufacture of ammunition.

Q. What was the principal business represented by Mr. W. E. Chollar?

A. The manufacture of small-arms ammunition.

Q. What was the principal business represented by Mr. M. J. Dailey?

A. The mining of lead.

Q. What was the principal business represented by Mr. C. M. Loeb?

A. Mining, smelting and refining of lead.

Q. What was the principal business represented by Mr. R. M. Evans?

A. The manufacture of lead oxides.

Trial Examiner Norwood: Now those names appear on what exhibits?

Mr. Ewing: On Exhibits 499-A to H inclusive.

Trial Examiner Norwood: Thank you. That is Commission's Exhibit 499-A to H; is that right?

2149 Mr. Ewing: Yes, Your Honor.

By Mr. Ewing:

Q. I show you a copy of Commission's Exhibit 799, the minutes of a meeting of the Lead Pigments Division of the Lead Industries Association of July 20, 1933, and ask you whether you acted as secretary at that meeting (showing to witness)?

A. I did.

Q. For what purpose was that meeting of the Lead Pigments Division called, if you know?

A. This meeting was called to develop suitable trade practices to incorporate in a supplemental code of fair competition for the Lead Pigments Division.

Q. I call your attention to the paragraph stating three subjects as being presented for discussion and ask you to state with respect to each subject the purpose for which they were brought up for discussion?

Mr. Wright: Your Honor, I object. There has been no showing here that this witness is in possession of the knowledge of the purpose for which these things were called.

Mr. Ewing: He was their secretary. He was there as secretary of the committee. Of course, if he doesn't know, he can say so.

Trial Examiner Norwood: I will ask him to answer of his own knowledge. Did you issue the call for that meeting?

2150 The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled, the witness may answer.

The Witness: Some of the subjects presented at this meeting, according to the record here which goes back fourteen years, were three in number. The first was a discussion on the practice of mailing contracts for lead oxide signed by the seller but not subject to immediate acceptance. (2) To accepting contracts for delivery of oxides beyond thirty days after the acceptance of the order or beyond the period in which orders might be covered in the pig lead market.

(3) The selling at old prices on the date of advance in the pig lead market. According to this record no action was taken on any of these items.

By Mr. Ewing:

Q. What was the purpose, if you know, Mr. Wormser, of bringing those up for discussion?

A. The purpose of bringing those up was to decide whether or not they should be made recommendations for inclusion in the supplemental code of fair competition for the lead industry.

Q. And that proposed supplemental code was under consideration at that time; is that correct?

A. That supplemental code was under considera-
2151 tion at that time at the insistence of the NRA.

Q. I show you Commission's Exhibit 800-A to C inclusive, the minutes of the Dry Products Committee of the Lead Pigments Division of August 8, 1933, and ask you whether you acted as secretary at that meeting (showing to witness)?

A. I did, sir.

Q. You will not the reference to a summary of suggestions in the paragraph immediately following the listing of the attendance, and I ask you whether you have that summary of suggestions (showing to witness)?

You might read the minutes to yourself.

A. Yes. I would like to refresh my memory.

Q. All right. Have you the summary of suggestions referred to?

A. Yes, sir. They are incorporated in these minutes of August 8, 1933.

Q. For what purpose was the summary offered for the consideration of the meeting?

Mr. Wright: Your Honor, I object to that question. There is no showing on the face of the exhibit that this was

a summary and counsel is putting words in the witness' mouth by his characterization of it in that fashion. I object to it.

Mr. Ewing: The exhibit states specifically that it was a summary. A summary of suggestions previously
2152 offered by members for consideration and a tentative draft of a code of fair competition for dry pigments compiled by Mr. Sprague was submitted for consideration.

Mr. Wright: I would like to point out, however, that the other suggestions were then considered in detail in the following paragraphs to be included in the code of fair competition and were tentatively adopted to apply to lead oxides. So that the material under that paragraph is not characterized as a summary on the face of the exhibit.

Mr. Ewing: I am not referring to that yet, I haven't gotten that far.

Trial Examiner Norwood: Now the purpose is a sort of a hidden thing and the question arises as to whose purpose. Now this witness may tell his purpose.

Mr. Ewing: He was acting as secretary of this committee.

Trial Examiner Norwood: And he can tell what somebody else said was the purpose that came to him in the course of his official action. But I don't think he can just say offhand what the general purpose of everything was.

Mr. Ewing: Well, I can withdraw the question, amend it and present it in slightly different form.

Trial Examiner Norwood: Yes, that would make it more satisfactory.

2153 By Mr. Ewing:

Q. I will ask Mr. Wormser to tell, if he knows, what brought up for the consideration of the Dry Products Committee of the Lead Pigments Division, the summary of suggestions referred to in the paragraph immediately following the attendance listing?

A. Recollecting what happened in the NRA days, this was an effort to meet the wishes of the NRA officials. I might state that our entire industry was very loath and very reluctant to enter into these NRA code formations and, as a matter of fact, as the code was first developed the code had practically no fair trade practices in it.

But at the insistence of NRA officials we were asked to provide some supplemental trade practices, and the in-

dustries which lent themselves or expressed themselves as being in a position to formulate a supplemental code along the lines of the NRA were the pigment industries.

And they agreed to endeavor to try to formulate a supplemental code. And this is one of the meetings at which this effort to develop a supplemental code satisfactory to the NRA authorities was considered.

Mr. Wright: Your Honor, I object and I move that that answer be stricken. In the first place, the witness has referred to the NRA as asking and they were asked and we did. There has been no characterization there from
2154 whom the request might have been made.

The NRA, you can take judicial notice, was a large governmental body. When the witness speaks of "we" and "they," there is no characterization of whom he is speaking and the whole statement was indefinite and improper.

Mr. Ewing: I will bring out whom Mr. Wormser means by we and they.

Trial Examiner Norwood: All right.

By Mr. Ewing:

Q. Who asked you?

A. Mr. Walter Jannsen, deputy administrator of the NRA.

Q. And you were the person asked?

A. I was the person asked repeatedly.

Mr. Wright: Your Honor, I still object to that. There has been no statement of what he was asked specifically.

Trial Examiner Norwood: Well, all that may come out.

Mr. DuBose: He stated what he was asked.

Mr. Wright: Now he doesn't speak of any request that might have been made by a governmental agency to the Lead Association for consideration of these matters.

Trial Examiner Norwood: Now you have put these minutes in here and they have a right to explain it.

Mr. Wright: I am not questioning their right to explain it but when he says the NRA asked us to do this
2155 without any indication as to who us is, it is obviously an improper statement.

Trial Examiner Norwood: He is telling about it. I will have to overrule your objection on that. Make it specific. Go ahead.

By Mr. Ewing:

Q. I direct your attention to that portion of the minutes which refers to a suggestion by Mr. Roosevelt and ask you whether at that time there was any decision on the point with respect to the inclusion of such matter in the proposed code?

A. "Mr. Roosevelt suggested—'reading from the minutes'—the simplest method would be to formulate a code requiring that each member file a price list of his selling practices with the secretary of the Lead Industries Association to be effective ten days after filing and immediately published to all members by the secretary, allowing other members to file a new list immediately, effective at the same time, if they so desired, and providing that any deviation from the filed list be violations from the code."

No action was taken on that nor at any time with regard to the activities of the Lead Industries Association was any price list gathered.

Mr. Wright: I object to the last part of that statement, "No action was taken." It was a volunteer state-
2156 ment that was not responsive to the question.

Mr. Ewing: I will consent that that part will be stricken.

Trial Examiner Norwood: Strike that. Proceed.

By Mr. Ewing:

Q. The minutes recited a consideration of the suggestions made in connection with the sale of lead oxides listing by number some 19 matters. Was the consideration given these matters at that meeting directed at a decision as to whether such matters should be covered in the proposed code?

A. Those matters were considered for inclusion in the supplemental code of fair competition for the dry products producers.

Q. Now with respect to the recital in the minutes of a discussion of consignment accounts, was or did that discussion take place in connection with a consideration of that subject under the proposed code?

A. That was also one of the items that related to the drafting of a supplemental code of fair competition for the dry pigment producers.

Q. On the third page, Exhibit 800-C, there is also a reference to allowance on returnable packages and to off-

grade material. Were those subjects considered in connection with the proposed code?

Mr. Wright: Your Honor, I object to these questions as leading. After all, this witness is a representative
2157 of the respondents here and certainly he should not be asked questions which merely ratify or don't ratify counsel's questions on these things.

He may have some independent recollection of these matters and if he has they ought to be brought out by questions which are not leading.

Mr. Hinds: I would like to ask counsel in what respect that last question is proving. How can you possibly prove a negative without asking him if such a thing was done. By its very nature it couldn't possibly be leading. If a man is charged with doing something and you as did you do it, that is not leading.

Mr. Wright: The answer is suggestive. Yes, of course this was considered in connection with the proposed code.

Mr. Hinds: How can we negative a charge without asking him a question of that sort?

Mr. Wright: May I ask that the question be read?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. On the third page, Exhibit 800-C, there is also a reference to allowance on returnable packages and to off-grade material. Were those subjects considered in connection with the proposed code?")

Trial Examiner Norwood: Objection overruled.

2158 Answer the question.

The Witness: They were considered in connection with the drafting of a supplemental code of fair competition for the dry pigments producers.

By Mr. Ewing:

Q. Will you state whether the balance of the subjects considered at that meeting as set forth on Exhibit 800-C were subjects of discussion generally in connection with the consideration of the proposed supplementary code?

Mr. Wright: May I have that question again?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you state whether the balance of the subjects considered at that meeting as set forth on Exhibit 800-C were subjects of discussion generally in connection with the consideration of the proposed supplementary code?")

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I object to the question, Your Honor. These minutes are detailed and they state exactly what occurred and what subjects were under consideration. And it has not been shown that this witness has any independent recollection of what occurred there.

2159 He has been constantly referring in his answers, "Well, the minutes show that."

Trial Examiner Norwood: I am going to ask this witness not to answer with regard to what the minutes showed but you may answer that question and I will overrule the objection, and ask you to answer that question from your own recollection of it.

Now if you don't recollect it, just say so because the minutes of that speak for themselves.

Mr. Ewing: But he may refresh his recollection from the minutes.

Trial Examiner Norwood: Yes.

The Witness: I recollect vividly that all of those items at this meeting here were all for the purpose of drafting a supplemental code of fair competition for the pigment industry.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's Exhibits 501-A to D, minutes of a meeting of the white lead in oil committee of the Lead Pigments Division of August 9, 1933, and ask you whether you acted as secretary at that meeting?

Trial Examiner Norwood: Is that exhibit in evidence?

Mr. Ewing: Yes, sir.

The Witness: No, sir; I did not act as secretary of that meeting.

2160 By Mr. Ewing:

Q. Will you tell us for what purpose the white lead in oil committee of the Lead Pigments Division was organized, if you know?

A. The white lead in oil committee was organized to draft a supplemental code of fair competition for white lead in oil.

Q. Will you tell us for what purpose the Dry Products

Committee of the Lead Pigments Division was organized, if you know?

A. The Dry Products Committee was also organized for the purpose of drafting a supplemental code of fair competition for dry products.

Q. You have stated that you were not present at this meeting. Will you state whether you, at that time, were familiar with the subjects discussed and actually informed yourself as to the subjects discussed at that meeting?

A. I did.

Q. I direct your attention to that portion of the minutes relating to the item of "reports" and ask you whether you know to what the item stated in the minutes refers to (showing to witness)?

A. I believe the item of "reports" referred to the statistics of the Lead Industries Association relating to white lead in oil.

2161 Mr. Wright: I object, Your Honor. By the answer he obviously doesn't know of his own knowledge.

By Mr. Ewing:

Q. Do you know?

A. I don't know exactly, but I think—

Trial Examiner Norwood: (Interposing.) The objection is sustained. The answer will be stricken.

By Mr. Ewing:

Q. Prior to this meeting of August 9, 1933, and prior to the passage of the National Recovery Act, was it the practice of the members of the Lead Industries Association to file with you individual reports of their respective production, stocks, shipments or sales?

A. Yes, sir.

Q. Were the reports of the individual members filed with you ever distributed by you to other individual members?

A. Never.

Q. You will note the suggestion which appears in that portion of the minutes relating to the item of "reports". Were individual reports of production, stocks and shipments or sales ever made available to other members of the white lead in oil group at periodic meetings?

A. Never.

Q. I direct your attention to that portion of the min-

utes relating to price lists and ask you to read it
2162 (showing to witness).

A. Out loud?

Q. No, just to yourself.

A. I have read it (handing back to counsel).

Q. I also ask you to read the present membership of the white lead in oil group as indicated by the minutes?

A. I have read it.

Q. I now ask you to state whether members of the white lead in oil committee ever filed with you their price lists with terms and conditions of sale?

A. They never did.

Q. Did any of the companies represented in this group at any time ever file with you their price lists with terms or conditions of sale?

A. Never since the history of the founding of the Lead Industries Association to this very minute.

Q. State whether the individuals representing the companies in the white lead in oil group ever filed with you any change in price lists or terms to the trade?

A. Never.

Q. State whether the company members of the white lead in oil group or committee ever filed with you any change in price lists or terms of trade?

A. They never did.

Q. Were there filed with you by either the com-
2163 pany members or their representatives variances from price lists or terms of sale?

A. No, sir.

Mr. Wright: Your Honor, I object to any further testimony along this line. The complaint doesn't charge any price filing under that section. It has never made an issue of it in the case.

Mr. Ewing: The complaint charges that Lead Industries was one of the mediums through which the conspiracy and what not was effected and I propose to show that it was not.

Trial Examiner Norwood: Well, it does charge price fixing against all of these people.

Mr. DuBose: Certainly it does.

Trial Examiner Norwood: Proceed.

Mr. Ewing: It specifically charges that we exchanged directly and through the office of Lead Industries Association and with the cooperation of the officials of that Asso-

ciation price factors and information concerning price factors.

Trial Examiner Norwood: Objection overruled. Proceed.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's Exhibit 502-A to C inclusive, the minutes of the white
2164 lead in oil committee, Pigments Division, of September, 6, 1933, and ask you whether you acted as secretary at that meeting?

A. Yes, sir; I did.

Q. State, if you know, in what connection the paragraphs in the proposed paint code referred to in these minutes were considered?

A. These paragraphs were considered for the preparation of a supplemental code of fair competition for the white lead in oil industry.

Q. You prepared these minutes?

A. Yes, sir.

Q. When you referred to those paragraphs in the proposed paint code as being adopted, for what purpose were they adopted?

A. They were adopted for incorporation in the proposed supplemental code for fair competition in the white lead in oil industry for submission to the administrator in Washington.

Q. Do you know whether these paragraphs were, in fact, ever included in a supplementary code?

A. I have to refresh my memory, sir, about that because it is a long time ago.

Q. I show you a copy of Commission's Exhibit 809, a printed copy of the code of fair competition for the lead industry, and direct your attention to Article 7, Sec-
2165 tions 1, 2 and 3 thereto.

A. Yes, sir.

Q. And I ask you to compare the paragraphs referred to in the minutes of the September 6, 1933 meeting with Article 7 of the code and state which of the proposed paragraphs were in substance included in the code?

Mr. Wright: Your Honor, I object. The code as it was finally adopted is not reported in this copy. These minutes are in the record and it is a simple matter of comparison and that, in fact, is all that counsel is asking the witness to do.

His testimony can add nothing nor retract nothing.

Mr. Ewing: My point is that there may be a misinterpretation of the word "adopted" in these particular minutes.

Trial Examiner Norwood: It would appear in the code itself and they can be prepared. If there is any other matter that doesn't appear in the two exhibits that you may want to bring out you may do so, but in the face of an objection, I think that the objection should be sustained.

Mr. DuBose: May I make this statement before you make your ruling?

Trial Examiner Norwood: Yes.

Mr. DuBose: We object to all NRA documents, particularly at the hearings last June when most of these
2166 documents were introduced on the ground that they were code documents and on the further ground that they were irrelevant.

You asked counsel for the Commission how they were relevant and his answer was that these meetings showed activities not sanctioned by the law. And that by engaging in these activities we were acting in violation of the law.

We know of no law which prohibited members from meeting to consider supplemental codes when such was required by the National Industrial Recovery Act. We are, therefore, led to the possible conclusion that what trial counsel has in mind is using these minutes in an attempt to prove agreements outside of the NRA activities or the code.

To that extent we must go into every one of these items mentioned in these minutes to see for what purpose those particular paragraphs were discussed.

Trial Examiner Norwood: You can bring out the purpose there. He is asking him what is the difference between two exhibits.

Mr. Wright: And that is obvious upon an examination of them by anyone connected with the case. The testimony of this witness as to the difference isn't going to establish any more than it is already established in the record.

Trial Examiner Norwood: Counsel may make his
2167 own statement about those differences and he can go on the record right now if he wants to inasmuch as there is an objection to this witness testifying to it. I think I will have to sustain the objection in that regard.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. In what connection did the committee adopt the paragraph on taxes referred to in these minutes?

A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.

Mr. Wright: I move to strike the answer because he doesn't know from his own knowledge.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. In what connection did the committee adopt the paragraph on taxes referred to in these minutes?

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.")

Trial Examiner Norwood: What is your question directed to?

2168 Mr. Ewing: Well, it is not exactly—

Mr. Wright: (Interposing.) By the terms of the answer, it was a conclusion on the witness' part, a belief that he had.

Trial Examiner Norwood: Read the answer again.

(The reporter read the answer again as follows:

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.")

Trial Examiner Norwood: I think that counsel should be allowed some latitude about explaining this thing.

Mr. Wright: I have no objection to some latitude, Your Honor, but when it was obviously a conclusion of the witness, I mean he is testifying about things now that occurred some fourteen years ago.

Trial Examiner Norwood: Yes. Read the answer again.

(The reporter read the answer again as follows:

"A. That was also, I believe, a part of the supplemental code of fair competition for the white lead in oil industry.").

Trial Examiner Norwood: Objection sustained, the answer will be stricken.

By Mr. Ewing:

Q. I will ask you, Mr. Wormser, to refresh your 2169 recollection by reading the portion of the minutes referring to the paragraph on taxes (showing to witness)?

A. Yes.

Q. Having read that portion of the minutes, Mr. Wormser, will you state, if you know, in what connection the committee considered and took action on that paragraph?

Trial Examiner Norwood: Answer that from your own knowledge.

Mr. Wright: Before the witness answers that, Your Honor, I would like to examine him briefly on his recollection and refresh him by that document if I may.

Trial Examiner Norwood: I don't think that is necessary. You can cross-examine him on it.

Mr. Wright: I think I have a right to determine the extent of his independent recollection of this meeting and of what occurred there and to examine him.

Trial Examiner Norwood: I am going to ask him that now. You have examined that document and if you now have an independent recollection of it after examining the document, you can answer the question, and if you do not, then say so. I will overrule the objection.

The Witness: The minutes have refreshed my recollection, sir, and the paragraph on taxes was adopted as a part of the proposed supplemental code of fair competition for the white lead in oil industry.

2170 By Mr. Ewing:

Q. I direct your attention to the first paragraph of Exhibit 502-C and ask you to read it.

A. I have read it.

Q. Will you state, if you know, in what connection the resolution set forth in that paragraph was adopted?

A. That was a resolution to act upon a suggestion—again, specifically of Mr. Walter Jaunsen, deputy administrator of the NRA—who wanted us to include in our supplemental code of fair competition a paragraph referring to a price listing or an exchange of price information. This was an attempt to meet his views.

Q. In what connection was the final paragraph of the minutes, appearing on Exhibit 502-C, adopted (showing to witness)?

A. This final paragraph was adopted for inclusion in the proposed supplemental code of fair competition for the white lead in oil industry.

Mr. Ewing: I believe, in accordance with Mr. Hinds' arrangement, that we recess at this time.

Trial Examiner Norwood: Is that all right with you?

Mr. Wright: Yes, Your Honor.

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

2171 (Whereupon, at 12:25 p.m., a recess was taken until 2:00 p.m., this day.)

2172-2173 Afternoon Session.

Trial Examiner Norwood: Come to order. Let us proceed.

FELIX E. WORMSER, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. Mr. Wormser, I show you a photostatic copy of Commission's Exhibit 801-A and B, minutes of the Dry Products Committee of the Lead Pigments Division of September 7, 1933, and ask you if you acted as secretary at that meeting (showing same to witness)?

A. I did, sir.

Q. Was that the first meeting of the White Lead In Oil Committee of the Lead Pigments Division?

A. This is the Dry Products Committee, I believe.

Q. You are right, I withdraw that question. You will notice the reference to the dry lead group in the minutes. Will you tell us what the dry lead group was?

A. That referred to the producers of dry white lead who sold their product to the prepared paint companies.

Mr. Wright: Where is that reference?

Mr. DuBose: It is Exhibit 801-A and B.

Mr. Ewing: It is the third paragraph after the attendance.

2174 Mr. Wright: I see it.

The Witness: I might also add that that was to distinguish it from White Lead In Oil.

By Mr. Ewing:

Q. Were the members of the dry white lead group the members of the Dry Products Committee of the Lead Pigments Division?

A. Yes, sir.

Q. You will note the reference in these minutes to the request that you as secretary read the price list paragraph adopted by the dry lead group. In what connection was that paragraph adopted?

A. The paragraph was adopted to be incorporated in a supplemental code of fair competition for the lead in oil industry and then adopted by the dry products group.

Q. You will note the reference in these same minutes that this same paragraph be adopted for the lead oxide group of the Dry Products Committee. Will you tell us what the lead oxide group of the Dry Products Committee was?

A. That oxide group of the Dry Products Committee referred to the producers of red lead and litharge which are oxides of lead in dry form.

Q. Am I correct in my understanding that the Dry Products Committee consisted of two groups, the dry white lead group and the dry oxide group?

2175 A. That is correct, sir.

Mr. Wright: I object to the form of the question, your Honor. It is counsel's conclusion and whether or not he is correct in it is irrelevant and immaterial.

Trial Examiner Norwood: Objection sustained.

By Mr. Ewing:

Q. Of what groups was the Dry Products Committee comprised?

A. It was comprised of the producers or manufacturers of lead pigments in dry form. That is, white lead dry and red lead and litharge dry. The white lead group, as I recall, were the dry white lead group and the red lead and litharge section were the oxide group.

Q. I call your attention to the reference in these minutes to certain unfair trade practices accepted by the Dry Products Committee in earlier session and ask you in what connection they were adopted as applicable to oxide manufacturers?

A. They were adopted as being part of a supplemental code of fair competition to be submitted to the NRA.

Q. I call your attention to the reference in these minutes to a discussion with respect to uniform sales contracts and ask in what connection the resolution referred to was adopted?

A. This resolution was also adopted to provide another part of the supplemental code of fair competition for
2176 this industry, the Dry Products Division.

Q. State whether the resolutions and agreements referred to in those minutes related solely to the development of the supplementary code of fair competition.

A. They related solely to the development of a code, a supplemental code of fair competition for the Dry Products Committee or Dry Products Division.

Q. I show you a photostatic copy of Commission's Exhibit 802-A and B, bearing the date of September 26, 1933, headed "Second Draft Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association," and ask you if you are familiar with that draft at that time?

A. I am.

Q. Does the provision which was the subject of the resolution relating to uniform sales contracts referred to in Commission's Exhibits 801-A and B appear in that second draft in substance?

Mr. Wright: May I have the question read?

Trial Examiner Norwood: Read the question, Mr. Reporter.

(The reporter read the question.)

The Witness: It does.

By Mr. Ewing:

Q. I show you photostatic copies of Commission's
2177 Exhibits 504-A and B, minutes of Dry Products Committee, Lead Pigments Division of October 27, 1933, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. You will note in the minutes the reference on page 2 thereof, namely, Exhibit 504-B, to existing statistics in the third from the last full paragraph.

A. Yes.

Q. To what statistics, if you know, did the minutes there refer?

A. That referred to the anti-trust laws.

Q. In the preceding paragraph in the same exhibit, I call your attention to the outlines referred to. State, if you know, what those outlines were.

A. Those outlines were again bases for developing, as a code, provisions to be embodied in a supplemental code of fair competition for the lead oxide and dry white lead groups.

Q. State, if you know, what the committee at that time concluded with respect to the inclusion in any proposed uniform contract relating to the sale of oxides and dry white lead of provisions relating to price fixing as to what determination there should be in regard to the question of price.

Mr. Wright: I object, your Honor. That obvi-
2178 ously calls for a number of conclusions on the part of the witness so—

Mr. Ewing: It doesn't call for a conclusion at all.

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Did the committee take any action that would indicate to you what their conclusions were?

The Witness: You mean at that particular meeting, sir?

Trial Examiner Norwood: At any meeting. Would it throw any light upon this question that has been asked?

The Witness: Yes, sir.

Trial Examiner Norwood: I will sustain the objection and let him give the evidentiary facts about what they concluded. You tell what they said and did that would indicate to you their conclusions were with respect to that matter. Ask the question over again.

By Mr. Ewing:

Q. I call your attention to the third from the last full paragraph on the second page of the minutes which is Exhibit 504-B, and ask you whether that will refresh your recollection as to what conclusion the committee then reached with respect to the inclusion in any proposed
2179 uniform contract of the sale of oxides and dry white lead of price fixing provisions?

A. It does refresh my mind.

Q. What conclusion did the committee reach at that time?

A. It was agreed, the minutes read, in deference to existing statistics—

Trial Examiner Norwood: Wait a minute, don't read that.

Mr. Wright: I object, your Honor, if the only refreshment is what answer in the minutes themselves, this witness has nothing to add to what is already in the record.

Trial Examiner Norwood: Tell us anything else about it except what is in there.

The Witness: Well, by personal conversation with the members of this group, they told me they were against incorporating anything in the code which had any relation to price fixing or the exchange of price information and this merely expresses their former point of view.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibits 505-A and B, minutes of the White Lead in Oil Committee of the Lead Pigments Division of October 28, 2180 1933, and ask you if you acted as secretary at that meeting.

A. I did.

Q. Would you read those minutes, please, to yourself?

A. Yes. I have read them.

Q. You will note the reference in the minutes to the statement by Mr. Carter concerning National Lead's new agency system. Will you state whether the members of the White Lead in Oil Committee reached any agreement at that meeting to use any agency or consignment system?

A. They did not.

Q. You will note also in those minutes the reference to the discussion of the freight and zoning problems. Please state whether there was any understanding or agreement reached at that meeting on those subjects by the members of that committee.

A. No understanding or agreement was reached by the members at that meeting.

Mr. Wright: I object to that, your Honor. Obviously both of the last questions call for a conclusion on the part of the witness as to what is an agreement or what is an understanding and there has been no groundwork laid to show that he knew everything that went on at those meetings unless he heard every conversation that was made.

By Mr. Ewing:

Q. You attended but that meeting, did you not, Mr. Wormser?

2181 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: I think that it would be more satisfactory if you bring it out like you did in the case of the other exhibit there. Just state what they said about it or give the evidentiary facts which would indicate to him what they concluded or what they agreed on.

Mr. Ewing: I will reframe the question.

By Mr. Ewing:

Q. What, if anything, was said about the members representing the white lead in oil committee at that meeting with respect to the agreement on freight and zoning problems?

A. Very little was said at that meeting about either freight or zoning problems. It was a matter of little significance to the group. So that as the minutes faithfully report here, no understanding was reached on the subject.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 803, the minutes of the meeting of the Lead Pigments Division of January 23, 1934, and ask you whether you acted as secretary at that meeting?

2182 A. I did.

Q. Will you please read the minutes of that meeting?

A. To myself?

Q. Yes.

A. I have read them.

Q. In what connection did the meeting agree to submit the price schedule paragraph quoted in these minutes?

A. This is in connection with the drafting of a supplemental code of fair competition for the White Lead in Oil Division.

Q. I show you a photostatic copy of Commission's Exhibit 518-A and B, which is a copy of a letter dated January 18, 1934 from M. F. Carter to W. M. Easton and Harold Rowe, and call your attention to the paragraph headed

"Schedules" and to the first full paragraph following the quotation at the top of page 2. Will you state whether the price schedule paragraph referred to in the letter, Exhibit 518-A and B, was the previously drafted price schedule paragraph—that is, drafted by the code administration in Washington—schedule referred to in the minutes, Exhibit 803?

A. The one in Exhibit 518-B is the one that appears in Exhibit 803.

Q. I am referring now to this paragraph which is Exhibit 518-A under the heading "Schedules" and am asking you whether that paragraph on schedules appearing
2183 on Exhibit 518-A, is the price scheduled paragraph described in Exhibit 803 as having been previously drafted in Washington by the administration?

A. This is different.

Q. You still don't understand my question. Exhibit 803 of the minutes refers to and quotes a paragraph to be submitted to the administration in lieu of a price schedule paragraph previously drafted in Washington by the administration.

A. Yes.

Q. Now, my question is, is the first paragraph headed "Schedules" on Exhibit 518-A the paragraph on schedules previously drafted in Washington?

A. Well, this one here, Exhibit 518-A is the one that was drafted in Washington.

Q. And this draft in Washington which appears on Exhibit 518-A, as to that, state whether that met with the approval of the Lead Pigments Division of the White Lead in Oil Committee.

A. That did not meet with the approval of the White Lead in Oil Committee of the Lead Pigments Division.

Q. And the paragraph quoted in the minutes of January 23rd, Commission's Exhibit 803, was the paragraph drafted by the White Lead in Oil Committee to be submitted in lieu of the administration's draft?

A. That's correct, sir.

2184 Q. In what connection did the committee propose to submit the price schedule paragraph quoted in the minutes, Exhibit 803?

A. It proposed to submit it in preparation of a supplemental code of fair competition for the white lead in oil industry.

Q. Now, I show you a photostatic copy of Commission's

Exhibit 804, bearing the date of January 27, 1934, and headed "Schedule A," and ask you to read it (handing same to witness.)

A. I have read it.

Q. Was that Schedule A drafted for inclusion in the proposed supplementary code?

A. It was.

Q. I show you photostatic copies of Commission's Exhibit 805-A, B and C, and ask you whether you acted as secretary at the meeting of the Dry Products Committee of the Lead Pigments Division of January 24, 1934?

A. I did.

Q. Will you read the minutes, please, to yourself?

A. Yes.

Q. State in what connection the price schedules previously adopted at the white lead in oil meeting were agreed upon at that meeting.

A. They were adopted in connection with prepara-
2185 tion of a supplemental code of fair competition for the Dry Products Committee of the Lead Pigments Division.

Q. State whether Schedule A a nexed consisting of Exhibits 805-B and C was drafted fo inclusion as a schedule in the proposed code.

A. It was also to be made part of the proposed code.

Q. I show you photostatic copies of Commission's Exhibits 524-A to E inclusive, headed "Supplementary Code of Fair Competition for the Lead Pigments Division of the Lead Industries Association Fourth Draft," and ask you whether prior to the date borne by that exhibit, November 11, 1933, there had been filed with the NRA, a master code covering the lead industry?

A. Yes.

Q. To what did the master code theretofore filed relate in the main, if you know?

A. It was mainly a labor code.

Q. State what you mean by labor code.

A. I mean it was a code designed to follow the wishes of the administration in creating more employment somewhat along the lines of the President's re-employment agreement which was the first general code promulgated by the administration.

Q. Did it relate to wages and hours?

A. Yes, it related to wages and hours.

2186 Q. I show you a photostatic copy of Commission's Exhibit 670 and ask you what it is (handing same to witness)?

A. This is a sample of the statistical reports issued by the Lead Industries Association. This one is dated February 16, 1943 and covering the domestic shipments, production in stocks in white lead by months for the years 1941, 1942 and the first month of 1943.

Q. State whether the Lead Industries Association receives from its membership producing white lead, reports relating to the domestic shipments, production and sales of each?

A. Shipments, production and stocks.

Q. Shipments, production and stocks of each?

A. It does with regard to production, shipments and stocks.

Q. State whether the information contained in the reports which you received from individual members is ever transmitted by you to other individual members.

Mr. Wright: Your Honor, I object to the leading character of these questions by counsel. After all, his witness stands in a very close relationship to him and certainly it seems to me that the questions could more properly be brought out by asking for the evidentiary facts. I object to that.

Trial Examiner Norwood: I think that is true.

2187 Mr. Ewing: I don't think that is a leading question, your Honor.

Mr. Wright: He was describing the kind of reports that the industry—counsel was describing the reports that the industry made to the Lead Industries Association and which in turn the association sent out to the members.

Trial Examiner Norwood: He told us this morning about some of that procedure there.

Mr. Wright: It has been testified to a number of times already in the case.

Trial Examiner Norwood: Read the last question.

(The reporter read the question.)

Trial Examiner Norwood: I think he could answer that either way. I don't think he is suggesting an answer there. He has specified very particularly the subject of the desired answer. I think he can do that. You can't get away from that in a question like that.

Mr. Ewing: And as you say, he can answer either way.

Trial Examiner Norwood: Objection overruled.

The Witness: The answer is never.

By Mr. Ewing:

Q. State whether the Lead Industries Association has ever collected from its individual members their prices on any commodity.

2188 A. It has never collected any price information from covering any product represented in the Lead Industries Association from mined to finished metal or the finished manufactured product.

Q. Has it ever collected from any of its members historical price information, historical in the sense of information relating to prices in the past?

A. It has never collected any historical price information from its members.

Q. Are the statistical reports which the Lead Industries Association issues to its members furnished to any persons or organizations outside of the membership?

A. The statistics—

Q. Just answer yes or no.

A. They are.

Q. Will you state in such detail as you may be able to, to what persons or organizations other than the members of the association your statistical reports are furnished?

A. Our statistical reports are furnished to various departments of the United States Government.

Q. For example.

A. The Department of Justice, the Federal Trade Commission, the Bureau of Mines, the Geological Survey, the United States Tariff Commission, the Bureau of Foreign and Domestic Commerce—there are some others

2189 that escape me for the moment.

Q. The reports to which you refer are reports similar in form to this Exhibit 770?

A. Yes, sir.

Q. How long have you been furnishing your statistical reports to the Federal Trade Commission?

A. Ever since the founding of the Lead Industries Association.

Q. How long did you furnish your statistical reports to the Department of Justice?

A. From the founding of the Lead Industries Association until a few years ago when we were specifically requested by the Department of Justice to cease sending them to them.

Q. You said, I believe, that you furnished statistical reports to the Bureau of Mines?

A. Yes, sir.

Q. Does the Bureau of Mines issue monthly statements of a similar nature?

A. On lead pigments?

Q. Yes.

A. Annually, sir; they are not monthly.

Q. They are not monthly?

A. That's right.

Q. For what reason, if you know, does the Bureau of Mines not issue monthly statistical statements of a
2190 similar nature?

A. They have come to us and told us they were so satisfied with the coverage of our reports and the public service that we are rendering, that they thought it would be in the interest to save the taxpayers money not to duplicate that service. So they have never duplicated it.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 666 and ask you what it is (handing same to witness)?

A. This is a record of the shipments of white lead pigments comprising white dry lead, white lead in oil, basic lead sulphate and leaded zinc oxide from the period 1930 to 1940 plus eight months of 1941.

Trial Examiner Norwood: That is a composite picture?

The Witness: That is the total by years; yes, sir.

By Mr. Ewing:

Q. Under what circumstances, if you know, was that prepared?

A. I believe this was prepared at the request of
2191 the Federal Trade Commission.

Q. At whose request?

A. I think it was by Mr. Dunn or Mr. MacIntyre. I have forgotten who asked for this special compilation.

Q. I show you a photostatic copy of Commission's Exhibit 667 and ask you what it is?

A. This is a tabular statement of the volume of white lead pigments comprising dry lead, lead in oil, lead sul-

phate with the grand totals for the years 1930 to 1941 inclusive giving the annual price and the total values for each of those years. These figures were obtained from the Bureau of Mines' mineral yearbook.

2192 Mr. Ewing: Might we take a short recess, Your Honor?

Trial Examiner Norwood: We will take a short recess at this time.

(A short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

By Mr. Ewing:

Q. I show you a photostatic copy of Commission's Exhibit 668 and ask you to state what that is?

A. This is a table showing the total sales of paint, varnish and lacquers and fillers as reported to the Bureau of Census, Department of Commerce, by 579 companies representing 87 per cent by volume of the industry from the years 1930 to 1941, only the first eight months of 1941 are included.

Q. Is that a statistical report prepared in the regular course of its business by the Association?

A. No, sir.

Q. Under what circumstances was it prepared?

A. I believe we were requested by the Commission to furnish this information.

Q. You didn't prepare it yourself, did you?

A. These are not our figures, sir.

Q. Well, I meant you yourself did not compile this information?

A. No, sir.

2193 Q. But it was prepared in your office; is that right?

A. It was prepared in our office.

Q. Referring back for the moment to Exhibit 666, I think you said that the figures there came from the Bureau of Mines; is that correct?

A. This is a combination report. Part of the date is from our own statistics—that is, the statistics of the Lead Industries Association and partly from the Bureau of Mines' statistics.

Q. And that was prepared by your office?

A. That was prepared by our office.

Q. I show you a photostatic copy of Commission's Exhibit 669 and ask you what it is?

A. This is a table showing the shipments of white lead, dry in oil by percentages for the years 1938, 1939, 1940 and 1941 of the National, Eagle Picher, the National Smelting and Refining, Fuller & McGregor and other companies. The others including Houston and Sherwin.

Q. Is that a regular statistical report prepared by your Association in the usual course of its business?

A. No, sir; it is not.

Q. Under what circumstances was it prepared?

A. Again, I believe this is a report which we were requested to make by the Federal Trade Commission.

Q. I show you Commission's Exhibits 507-A to M 2194 inclusive and ask you to read them over yourself (handing to witness).

A. I have read them.

Q. I call your attention to your letters to Messrs. Carter and Roosevelt, Exhibits 507-A and B and ask you to state whether Mr. Carter and Mr. Roosevelt did, in fact, telephone you in response to your letters?

A. They did.

Q. What instructions did they give you with respect to your application for a proposed extension relating to the applicability of the price filing provisions?

A. They approved the move I made to request a continuation of the exemption of that particular paragraph from the administrator.

Q. Mr. Wormser--

Mr. Ewing: You have the original exhibits 519-A and B?

Mr. Wright: Yes, sir (handing to counsel).

By Mr. Ewing:

Q. Mr. Wormser, I show you Commission's Exhibits 519-A and B directing your attention first to 519-B and ask you to read them to yourself (handing to witness).

A. I have read them.

Q. Do you recall testifying with respect to those exhibits in June 1946?

A. I do.

2195 Q. I show you a transcript of your testimony appearing at page 1036 of the transcript and ask you to read it insofar as it relates to Exhibit 519-B.

A. Yes.

Q. I show you pages 1189 and 1190 of the transcript

giving a portion of Mr. Dunn's testimony with respect to Exhibits 519-A and B and ask you to read them.

A. I have read them.

Q. Have you had a list made of all the papers, letters and other documents which your office gave to Mr. Dunn at the time he called in the course of his investigation?

A. Yes, sir.

Q. I show you a document consisting of two sheets which I would like marked Respondent's Exhibit 4-A and B for identification.

Trial Examiner Norwood: It will be marked Respondents' Exhibit 4-A and B for identification.

(The document referred to was marked Respondents' Exhibit 4-A and 4-B for identification.)

By Mr. Ewing:

Q. And I ask you what that is (handing to witness)?

A. This is a list of the memoranda, correspondence records, data, documents of various description lifted from our files and given to Mr. Dunn.

Q. Was that list returned to you by Mr. Dunn?

2196 I will withdraw that. Were those documents returned to you by Mr. Dunn subsequent to the delivery thereof to him or by someone acting for the Federal Trade Commission?

A. They were returned by the Commission and checked off.

Mr. Ewing: Mark this Respondents' Exhibit 5 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 5 for identification.

(The document referred to was marked Respondents' Exhibit 5 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a letter which has been marked Respondents' Exhibit 5 for identification and ask you whether that was received by you?

A. It was.

Q. At the same time did you receive from the Commission various documents theretofore furnished to Mr. Dunn?

A. Yes, sir.

Q. What examination, if any, did you cause to be made with respect to those documents upon their return to you?

A. We carefully checked on this list the items that had been submitted to the Federal Trade Commission to see whether they were all covered in the list we had made of the documents as they were originally given to the
2197 Commission and the checkmarks are shown here on this list.

Q. Indicating Respondents' Exhibit 4-A for identification?

A. That's right.

Q. Were all the documents that you had supplied Mr. Dunn returned to you on or about the date of Respondents' Exhibit 5 for identification, September 8, 1943?

A. Yes, sir.

Q. Will you examine Respondents' Exhibit 4-A and B for identification and ascertain what reference or references there are in it to any map furnished by you to Mr. Dunn?

Mr. Wright: Are you going to offer those in evidence?

Mr. Ewing: Yes, sir.

Mr. Wright: I submit that the list itself is the best evidence of what it contains.

Mr. Ewing: I offer Respondents' Exhibit 4-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: May I cross-examine the witness on the identification of this?

Trial Examiner Norwood: You may ask him voir dire questions on it.

Mr. Wright: Who prepared Respondents' Exhibit 4-A and B?

The Witness: That is the list you have there?

2198 Mr. Wright: Yes.

The Witness: My secretary, Mrs. Mayer.

Mr. Wright: At your request?

The Witness: Yes.

Mr. Wright: What was the approximate date that this list was prepared?

The Witness: Shortly after Mr. Dunn's first examination of our files.

Mr. Wright: Does this list purport to cover only the things that Mr. Dunn got from you the first time that he called on you?

The Witness: He made several visits to us. When you say the first time, I don't know whether you mean specifically the one day or the whole series of visits that he made.

Mr. Wright: Does this list purport to cover all of the documents that he got from you on the several times that he called on you?

The Witness: It does.

Mr. Wright: I have no objection.

Trial Examiner Norwood: Respondents' Exhibit 4-A and B for identification will be received in evidence.

(The documents referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 4-A and 4-B were received in evidence.)

2199 Mr. Ewing: I offer in evidence Respondents' Exhibit 5 for identification.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Mr. Wormser, I direct your attention to the pencilled notes in the lower right-hand corner of Respondents' Exhibit 5. Do you know who put those on there?

The Witness: I do.

Mr. Wright: Will you state who it was?

The Witness: My secretary, Mrs. Mayer.

Mr. Wright: Are those her initials?

The Witness: Yes.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 5.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 5, was received in evidence.)

By Mr. Ewing:

Q. I direct your attention to Commission's Exhibit 513-A to E inclusive and I also direct your attention to Respondents' Exhibit 4-B and ask whether the list of differentials, Exhibit 513-C and D and the map, Commission's Exhibit 513-E were among the papers supplied by you to Mr. Dunn and later returned to you?

2200 A. Yes, sir.

Q. State, if you know, whether you furnished Mr. Dunn with the map referred to in Commission's Exhibit 519-B and 519-A?

A. No, sir.

Trial Examiner Norwood: What is the map marked?

Mr. Ewing: That map is not marked, sir. I am trying to clear up a confusion.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. I ask you whether the map or any map such as that referred to in Mr. Mason's letter, Commission's Exhibit 519-B is in your possession?

A. No, sir.

Q. Have you had a search made for such a map?

A. Yes, sir.

Q. What did the search disclose?

A. No map.

Q. You only delivered one map then to Mr. Dunn?

A. Yes, sir.

Q. And that is the map which you have identified as Exhibit 513-E?

A. Correct.

2201 Q. Then I take it that you were in error in your testimony at page 1036 of the transcript when you said that the map referred to in Exhibit 519-B and 519-A had been delivered to Mr. Dunn?

A. Yes, sir; I was in error.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: When photostats have been obtained, I take it that Mr. Wright will have no objection to our substituting photostats of the Respondents' Exhibit 4-A and B and Respondents' Exhibit 5 so that the original exhibits may be returned to the files of the lead industries.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Respondents may have leave to substitute photostatic copies and withdraw the originals in the case of Respondents' Exhibit 4-A and B and Respondents' Exhibit 5.

By Mr. Ewing:

Q. Mr. Wormser, I direct your attention to the second paragraph of the letter, Commission's Exhibit 519-B and

ask you whether new differential points were ever set up and passed through your office?

2202 A. No, sir.

Q. Were any suggested changes in the differential referred to in Exhibit 519-B passed through your office?

A. No, sir.

Q. Was there built up through your office an official freight arrangement for the white lead in oil industry?

A. No, sir.

Q. I show you photostatic copies of Commission's Exhibits 696 and 697 and ask you to read them.

A. Yes.

Q. Who was W. R. Dice?

A. Executive vice-president of the Eagle Picher Lead Company.

Q. Do you know yourself with what branch of Eagle Picher's business he was connected?

A. I don't recall in 1937 what branch he was connected with.

Q. Who was Mr. Wilson referred to in those exhibits?

A. Mr. Wilson was the sales manager of the Metallic Lead Products Division of the National Lead Company.

Q. And who was Mr. Martino?

A. Mr. Martino was in the comptroller's office of the National Lead Company at that time to the best of my knowledge. It was ten years ago.

Q. Do you recall the subject of the conversation referred to in Commission's Exhibits 696 and 697?

2203 A. No, sir.

Q. Had that conversation related to price fixing or production control or allocation of markets would you have recalled it?

Mr. Wright: I object to that question, Your Honor. He has already stated that he doesn't know what the conversation was. Now he is being asked for a conclusion that if it had related to some particular subject would he have recalled it.

Trial Examiner Norwood: I think that objection must be sustained.

By Mr. Ewing:

Q. At any time have you heard conversations relating to those subjects between representatives of Eagle Picher and National?

Mr. Wright: What subjects?

Mr. Ewing: The ones referred to in the preceding question.

The Witness: That is, price fixing and the agreements and so forth?

Mr. Ewing: Yes.

The Witness: The answer is no.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. At any time have you heard conversations 2204 relating to those subjects between representatives of Eagle Picher and National?")

Trial Examiner Norwood: I think he may answer that.

Mr. Wright: I object to that, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Objection overruled.

The Witness: No.

Trial Examiner Norwood: We will recess at this time until tomorrow morning at 10:00 o'clock, a. m.

(Whereupon, at 3:30 o'clock, p. m., the hearing in the above-entitled matter was adjourned.)

2205

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 23, 1947.

Met, pursuant to notice, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2205-A E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for The Glidden Company.

2206 PROCEEDINGS.

Trial Examiner Norwood: Come to order.

Pursuant to adjournment on yesterday, the hearing in Docket No. 5253 is now convened for the taking of further evidence. I want to explain in a ruling I made yesterday that although I have not seen the record, as I recall it I stated that the question objected to was not leading because

it could be answered either way. I merely said half of what I had in mind.

I meant it to be answered either way so far as any suggestions contained in the question would indicate.

Let the record show the following appearances:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

Proceed.

FELIX E. WORMSER was thereupon recalled as a witness for the Respondent, and having been previously sworn, testified further as follows:

2207 *Direct Examination (Continued) by Mr. Ewing.*

Q. Mr. Wormser, under the NRA, was there a Code Authority established for the lead industry?

A. Yes, sir.

Q. Will you tell us what the Code Authority was?

A. The Code Authority acted as the body organized to carry out the provisions of the code of fair competition for the lead industry.

Q. Without refreshing your recollection, are you able to state who the members of the Code Authority were, not by name, necessarily?

A. The members of the Code Authority of the lead industry were, I believe, mainly the directors of the Lead Industries Association.

Q. I show you this book and ask you to tell us what it is (handing same to witness)?

A. This is the minutes of the meetings of the Code Authority for the lead industry.

Q. Were you the secretary of the Code Authority?

A. Yes, sir.

Q. And did you act as secretary at some, if not all, of the meetings of the Code Authority?

A. Yes, sir.

Q. Will you turn to the minutes of the third meeting of the Code Authority which was held on July 27, 1934?

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Who acted as secretary at that meeting?

A. I did.

Q. Am I correct, Mr. Wormser, in stating that the minutes of this meeting of July 27, 1934, appear on eight pages and that in addition there is an exhibit "B" on a separate page which is incorporated in those minutes?

A. Yes, sir.

Mr. Ewing: Your Honor, I have photostatic copies of the minutes and I propose to ask that the copies be marked for identification and I understand Mr. Wright will have no objection to that and that will permit Mr. Wormser to keep his records.

Mr. Wright: Providing Mr. Wormser will testify that the photostats are exact copies.

Mr. Ewing: I will ask him that.

By Mr. Ewing:

Q. I show you what purports to be photostatic copies of the minutes of that meeting and of Exhibit "B" and ask you to look at them and see whether they are in fact such (handing same to witness)?

A. They are.

Mr. Ewing: I ask that the photostatic copies be marked Respondent's Exhibit 6-A to I inclusive.

Trial Examiner Norwood: They will be so identified as Respondent's Exhibit 6-A to I inclusive.

(The documents referred to were marked Respondent's Exhibits 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, and 6-H and 6-I, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Were these minutes prepared by you, Mr. Wormser, which have been marked Respondent's Exhibits 6-A to I for identification?

A. Yes, sir.

Q. Do they correctly state what transpired at the meeting of the Code Authority held on July 27, 1934?

A. Yes, sir.

Mr. Ewing: I offer that in evidence as Respondent's Exhibit 6-A to I.

Mr. Wright: I object to the receipt of Respondent's Exhibit 6-A to I in evidence, your Honor, on the ground that it is immaterial and irrelevant and doesn't relate to any issue in this matter. As it is obviously on the face
2210 of these minutes, they relate to a Code Authority for the entire lead industry and that at least 95 per cent of the material in it relates to metallic lead and metallic lead products which are entirely out of the scope of this proceeding or at least the matters contained in the minutes here are. Furthermore, what the Code Authority under the NRA and the NRA itself did is irrelevant to this proceeding. The charge in this case—off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: The charge in this case is that these Respondents combined and conspired between and among themselves to fix and maintain prices. Now, there is no allegation that this was done through the NRA. Only a very small portion of the combination in conspiracy of the practices which we allege were adopted by a conspiracy ever found their way into any NRA code or were subject to any jurisdiction of the Code Authority and as to those practices, namely, the prices which finally appeared as schedule A and schedule B of the Code which are in the record, our allegation of conspiracy is without reference to the NRA and as to the adoption of these things prior to the time the NRA code became effective and the continuation of them after the time the NRA became in-
2211 operative. So that what the Code Authority of the NRA did is entirely irrelevant to this proceeding.

Mr. Wood: If your Honor please, I am a little bit confused here because at the last session which we held in Washington, I asked directly for a clarification of the record as to when this conspiracy commenced according to the government's position. I haven't a transcript with me but as I remember it, Mr. Wright replied that it commenced under the NRA.

Now, that was my understanding and I am rather confused by Mr. Wright's statement now.

Mr. Wright: I will say in answer to that that I believe Mr. Wood misunderstood what I said. If he didn't misunderstand what I said at that time, I certainly want to make it clear at this time. I believe I stated then that we allege the principal part of this conspiracy, the one relating to the setting of these zone plans and various other matters to have occurred in the period of 1933 and 1934 when these Respondents were engaged in ostensibly drafting an NRA code. But as I said then, and I will repeat it now, most of those agreements never found their way into any NRA code.

Mr. Ewing: If your Honor please, we have been charged with conspiracy and one of the mediums of conspiracy is alleged to be the Lead Industries Association. The
2212 situation in this case is, we believe, quite different from what is contained in similar cases and we propose to show as nearly as may be, and without unduly encumbering the record, the activities of these Respondents in and of themselves and as members of the Lead Industries Association and through members of the Code Authority so that this Court will know exactly what we did and will not be compelled to draw inferences.

Counsel for the Commission has introduced such documents as he has seen fit taken from the records of the Lead Industries Association having had access to all that, and I think we should be allowed to introduce that.

Mr. Wright: I would like to have a short voir dire examination with regard to these documents.

Mr. Ewing: I object to it.

Trial Examiner Norwood: It goes to the identification only.

Mr. Ewing: He has identified them.

Trial Examiner Norwood: The voir dire questioning will be confined to the identification. I guess he can make the examination a little broader than that. It goes to its admissibility. You may do that. I see your point now.

Mr. Wright: Mr. Wormser, I call your attention to the list on Respondent's Exhibit 6-A of members and alternates present. What were the company affiliations
2213 of Clinton H. Crane, chairman?

The Witness: Chairman and president of the St. Joseph Lead Company.

Mr. Wright: Do you know whether that company produces lead pigments in any form?

The Witness: They do not.

Mr. Wright: What was the business connection of F. M. Carter?

The Witness: President of the National Lead Company.

Mr. Wright: What was the business connection of W. W. C. Hunt?

The Witness: Vice-president of the Reynolds Metals Company.

Mr. Wright: Does that company produce lead pigments?

The Witness: No, sir.

Mr. Wright: What was the company affiliation of F. Y. Robertson?

The Witness: Vice-president of the United States Smelting, Refining and Mining Company.

Mr. Wright: And P. E. Sprague is connected with the Glidden Company?

The Witness: Correct.

Mr. Wright: Who is Mr. H. M. Brush?

2214 The Witness: Vice-president of the American Smelting and Refining Company.

Mr. Wright: Does that company produce lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. D. A. Callahan?

The Witness: A mine operator from Northern Idaho.

Mr. Wright: Has he anything to do with the production and sale of lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. I. H. Cornell?

The Witness: Vice-president of the St. Joseph Lead Company.

Mr. Wright: Does that company have any connection with the sale or distribution of lead pigments?

The Witness: No, sir.

Mr. Wright: Who is Mr. Clarence Glass?

The Witness: Vice-president of Anaconda Sales Company.

Mr. Wright: Was that company at that time in the production and sale of lead pigments?

The Witness: Strictly speaking, The Anaconda Sales Company is a subsidiary of either the International Smelt-

ing or the Anaconda Company, I don't know which.
2215 So that strictly speaking the sales company does not have anything to do with it but broadly speaking, it is part of the Anaconda organization.

Trial Examiner Norwood: Let me ask just one question.

Mr. Wright: Yes, your Honor.

Trial Examiner Norwood: Some of these people that are mentioned in these minutes are representatives of lead producers, are they not?

The Witness: Yes, sir.

Trial Examiner Norwood: Are they connected with these Respondents?

The Witness: Some of them are, sir; yes, sir.

Trial Examiner Norwood: The matter is simpler than we are making it out here because the issue is whether or not a method was employed, not whether it was employed on this or that, just so that it is shown that it was employed in some of these things which these companies were producing or selling. It is the method that we are after, and the Commission has introduced some of these minutes here showing these activities and these papers are admissible if they contain anything that reflects the attitude of these respondents towards any of these methods or practices alleged.

Inasmuch as the Commission has put in part of the
2216 story, the Respondents will be permitted to put in the other part according to our practice.

Mr. Wright: Mr. Wormser, at this meeting at which this exhibit purports to be the minutes, were trade practices in the lead pigments industry discussed and considered?

Mr. Ewing: I object, your Honor. The document is offered for identification. It is not in evidence and this is no proper examination by the Commission's counsel.

Trial Examiner Norwood: I have already ruled. I will overrule the objection to this. You may cross-examine him on that, Mr. Wright. Respondent's Exhibit 6-A to I inclusive are received in evidence.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, and 6-I, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser—

Trial Examiner Norwood: On that point I can cite you

two or three cases that go to that point of the Commission prohibiting a method and that the order may be broader than simply the mention of the means indicated in the complaint.

Mr. Wright: Your Honor, in that connection I say
2217 that I carefully avoided putting in any documents relating to the actual operation of the Code Authority into evidence as part of the Commission's case for the simple reason that I don't consider that that had anything to do with the conspiracy.

Mr. Ewing: That is slightly different from my view as to the reason why it was avoided.

Trial Examiner Norwood: I will cite the case of Dietzon against the Federal Trade Commission (142 Fed. 2nd 341) and the recent Muller case in the same volume, page 511, and the case there cited. Proceed.

By Mr. Ewing:

Q. Mr. Wormser—

Mr. Wright: I would like to note an exception to the ruling, your Honor.

Trial Examiner Norwood: Exception noted. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Will you examine the minutes of this meeting, Mr. Wormser, of July 27, 1934 and tell us whether you find anything therein relating to formal notification from the National Recovery Administration with respect to the by-laws of the Code Authority. I think you will find it
2218 on the second page.

A. I see it, yes.

Q. Was the statement in the minutes with respect to formal notification inserted therein by you pursuant to instructions given you at that meeting?

A. Yes, sir.

Q. Did you receive from the members of the Code Authority at that meeting any instructions with respect to formal notification from the National Recovery Administration in connection with Section II of Article 7 and Schedule "A" of the Code. You will find that on the same page immediately above that.

A. Yes, I have it.

Q. Well, did you receive any instructions? Just answer yes or no.

A. We did, yes.

Q. What instruction was given you by the members of the Code Authority?

A. By the members of the Code Authority?

Q. Yes, with respect to the formal notification from the National Recovery Administration.

A. The secretary was instructed to insert in the record the formal notification from the National Recovery Administration granting temporary exemption from Section II of Article 7 and Schedule "A" of the Lead Code.

2219 Q. Now, will you turn to Exhibit "B" in evidence as Respondent's Exhibit 6-I, and tell us what that is?

A. That is an order granting temporary exemptions from the trade and marketing provisions for the Lead Pigments Division of the lead industry.

Q. When you said "order," you mean a copy of an order?

A. Signed by Mr. C. E. Adams, Division Administrator.

Q. I show you a letter on the letterhead of the National Recovery Administration dated July 16, 1934 addressed to the Lead Industry Code Authority and attached documents and ask you whether you as secretary of the Lead Industry Code Authority received that letter and the attached documents (handing same to witness)?

A. I did.

Mr. Ewing: I will ask that the letter and the documents be marked Respondent's Exhibit 7-A, B and C for identification.

Trial Examiner Norwood: They will be so identified as Respondent's Exhibit 7-A, B and C.

(The documents referred to were marked Respondent's Exhibits 7-A, 7-B, and 7-C for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer Respondent's Exhibits 7-A, B and C for identification in evidence.

Trial Examiner Norwood: Any objection?

2220 Mr. Wright: Mr. Wormser, what is Section II of Article 7, Schedule "A" of the Code?

Mr. Ewing: I object, your Honor. This is offered in evidence and this is no time for him to cross-examine as to what the section is.

Mr. Wright: He is identifying the document.

Mr. Ewing: He says it was received.

Trial Examiner Norwood: He has not said anything about the contents.

Mr. Wright: As I recall his testimony, he testified that this was a letter received from the National Recovery Administration with a certificate covering an exemption from that section of schedules.

Mr. Ewing: With documents attached. I didn't say what they were, they speak for themselves. I told you over there what they were.

Mr. Wright: Well—

Trial Examiner Norwood: Are they related documents?

Mr. Ewing: They were forwarded with the letter, your Honor. They were enclosures and that is all I asked him, as I recall.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: I object to the offer of Respondent's
2221 Exhibit 7-A, B and C, on the ground that it is immaterial and irrelevant. There is absolutely no issue with regard to the exemption under Section II of Article 7 of the Code. I stated on the record yesterday that there was no contention that the price filing provisions of the Code were ever actually put into operation through the Lead Industries Association, and that is what this section relates to.

Mr. Ewing: It also exempts Schedule "A" which was the contract form of terms and conditions of sale upon which Mr. Wright relies. Our position is the same with respect to this as with the other records at the time.

Trial Examiner Norwood: I think this is just as relevant as the other testimony we have received here. You may enlarge on it a little and you may cross-examine him on it, but I shall overrule the objection and receive Respondent's Exhibit 7-A, B and C in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 7-A, 7-B and 7-C for identification, were received in evidence.)

Mr. Ewing: We would like to have permission to have that photostated at the same time as we have the other exhibits photostated.

Trial Examiner Norwood: Is that agreeable, Mr. Wright?

Mr. Wright: Yes, your Honor: That is agreeable.

2222 Trial Examiner Norwood: You will have that photostated and they will be substituted and given to the reporter here.

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: You may have permission to do that. Is that to be your procedure with respect to Respondent's Exhibits 4-A and 4-B and Exhibit 5, because if they are to be withdrawn here, I will have to write a memorandum about it?

Mr. Du Bose: We will have Exhibits 4-A and B and Exhibit 5 photostated today.

Trial Examiner Norwood: If you do that then they can go in as original exhibits by agreement.

By Mr. Ewing:

Q. Mr. Wormser, I show you a document consisting of—

Mr. Ewing: I will ask that these two pages be marked Respondent's Exhibit 8-A and 8-B for identification.

Trial Examiner Norwood: They will be so marked as Respondent's Exhibit 8-A and 8-B for identification.

(The documents referred to were marked Respondent's Exhibits 8-A and 8-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you the two pages which have been marked Respondent's Exhibits 8-A and 8-B for identifica-

2223 tion, and ask you whether you prepared Exhibit 8-A (handing same to witness)?

A. I did.

Q. What disposition, if any, did you make of Exhibit 8-A and 8-B?

A. This was circulated to the members of the Code Authority.

Q. When you say members of the Code Authority, whom do you mean?

A. Well, I mean the personnel who composed the Code Authority.

Q. That is, representatives of certain of the members of Lead Industries Association; is that right?

A. That's correct.

Mr. Ewing: I offer Respondent's Exhibits 8-A and 8-B for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. This is the third straight exhibit containing the certificate dated June 27, 1934 by Janssen, and it is accumulative.

Mr. Ewing: It shows when the exemption was applied for and when it was distributed.

Trial Examiner Norwood: Objection overruled, and the exhibit will be received as Respondent's Exhibit 8-A and B.

(The documents above referred to, heretofore
2224 marked for identification as RESPONDENT'S EXHIBITS 8-A and 8-B, were received in evidence.)

Mr. Ewing: If we may, we would like to have this photostated too. You have no objection to that, have you, Mr. Wright?

Mr. Wright: No, sir.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, will you look at your minute book and turn to the minutes of the meeting of the Code Authority of September 25, 1934?

A. Yes, sir.

Q. Have you found those minutes?

A. Yes, sir.

Q. I direct your attention to that portion of the minutes commencing on the second page which relates to a petition for exemption from certain provisions of the Code and ask you to state—I will withdraw that question.

I ask that you examine these six photostats and state whether they are correct copies of the minutes of the meeting of September 25, 1934 (handing same to witness)?

A. They are.

Mr. Ewing: I ask that the six photostats be marked Respondent's Exhibits 9-A to F inclusive.

2225 Trial Examiner Norwood: They will be so marked as Respondent's Exhibits 9-A to 9-F inclusive for identification.

(The documents referred to were marked Respondent's Exhibits 9-A, 9-B, 9-C, 9-D, 9-E, and 9-F, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Did you act as secretary at that meeting of September 25, 1934 of the Code Authority?

A. Yes, sir.

Mr. Ewing: I offer Respondent's Exhibits 9-A to F inclusive for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. They are incompetent and irrelevant.

Mr. Ewing: I call your attention, your Honor, specifically to the second page where reference is made to the further application for exemption from the provisions of the Code.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibits 9-A to F inclusive. The objection is overruled.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 9-A, 9-B, 9-C, 9-D, 9-E, and 9-F for identification, were received in evidence.)

2226

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have an exception on all this.

Mr. Ewing: My understanding is that we all have an automatic exception to any adverse rulings.

Trial Examiner Norwood: That's correct. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to that portion of these minutes headed "Petition for Exemption Lead Pigments Division," appearing on Respondent's Exhibit 9-B and C, and ask you to read it.

A. I have read it.

Q. Did you write the National Recovery Administration on September 18, 1934, the letter quoted in those minutes?

A. I did write such a letter.

Q. Was that letter which you wrote the National Recovery Administration the letter approved by telephone by Mr. F. M. Carter and Mr. Roosevelt, a draft of which is in evidence as Commission's Exhibit 507-C which I show you and which, I believe, you saw yesterday?

2227

Mr. Du Bose: That is Exhibit 507-C.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Was that letter which you wrote the National Recovery Administration the letter approved by telephone by Mr. F. M. Carter and Mr. Roosevelt, a draft of which is in evidence as Commission's Exhibit 507-C which I show you and which, I believe, you saw yesterday?")

Mr. Wright: I object to that question, your Honor. It puts words in the witness' mouth about telephone conversations and so forth.

Mr. Ewing: It doesn't put any words in his mouth at all. He testified yesterday that a letter to the Recovery Administration had been approved over the telephone.

Trial Examiner Norwood: Objection sustained. That is as leading as a question could be.

Mr. Du Bose: How could it be, your Honor? All we are trying to do is to find out whether this draft which he identified yesterday is the draft of the letter that is quoted in the minutes. It is a simple factual question.

Mr. Wright: I don't object to the factual question part as much as I do the characterization of Commission's Exhibit 507-C which is contained in the question.

Mr. Ewing: If you only object to the characterization, then I won't characterize any of it.

2228

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I will ask you, Mr. Wormser, whether the letter set forth in Respondent's Exhibits 9-B and 9-C, in the minutes of the meeting of September 25, 1934, was the subject of your letter to Mr. Carter and your letter to Mr. Roosevelt, both dated September 17, 1934, in evidence as Commission's Exhibit 507-A and B which I show you (handing same to witness)?

A. Yes, sir; it was.

Q. Will you state whether the National Recovery Administration responded formally to your letter of Septemper 18th, if you know?

A. I don't recall, sir. I believe it did, though.

Mr. Wright: I move that the last part of the answer be stricken.

Trial Examiner Norwood: Motion allowed.

By Mr. Ewing:

Q. Did the provisions of Section II of Article 7 of the Code, Commission's Exhibit 809 and Schedule "A" ever become effective during the existence of the Code Authority?

A. No, sir.

Mr. Wright: I object to that. I think the question is indefinite and that it is not susceptible to a yes or
2229 no answer in the form in which it is asked. It calls for a conclusion on the part of the witness as to what "effective" means.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Did the provisions of Section II of Article 7 of the Code, Commission's Exhibit 809 and Schedule "A" ever become effective during the existence of the Code Authority?")

Mr. Wright: Your Honor, it has already been testified to by Mr. Zoller and Mr. Merson that the trade practices covered by that Schedule "A" have been employed by the National Lead Company and the Eagle Picher Company over a period of time starting back in that time. Well, now, obviously—

Trial Examiner Norwood: You mean the practices are described?

Mr. Wright: Yes.

Trial Examiner Norwood: He is not asking about that.

Mr. Ewing: That is quite a different question.

Mr. Wright: I don't think the witness should be permitted to state yes or no to a question which so obviously calls for a conclusion on his part as to what "effective" means.

2230 Trial Examiner Norwood: He is asking him whether or not—you see, they have got a code here, and immediately this company here—I would like to know the answer to that question myself—they had it suspended with respect to them and while they had the suspension continued—and he wants to ask this witness as an official in this organization here who would know whether or not at any time that code was effective with respect to these people.

Mr. Wright: No, sir. It isn't a question as to whether that provision became operative as far as the Code Au-

thority was concerned. The word "effective" is much broader than that. His answer might comprehend there and possibly be construed or Respondent's attempt to take an inference from it that no one of the Respondents ever put into practice the practices covered by that schedule.

Mr. Ewing: I am not asking him that question. I restricted it to the Code Authority.

Trial Examiner Norwood: Objection overruled. Answer the question. You may cross-examine him on it.

The Witness: No, sir.

By Mr. Ewing:

Q. Was the Code Authority charged with the duty of administering the provisions of the Code for the lead industry?

2231 A. Yes, sir.

Q. In the absence of permission from the administrator, would the Code Authority have been required to enforce the full provisions of the Code?

A. Yes, sir.

Q. And it is for that reason, is it, that the request for exemption was made?

Mr. Wright: I object to it as a leading question, your Honor.

Mr. Ewing: I will withdraw the question.

Trial Examiner Norwood: You are asking for somebody else's reason.

Mr. Ewing: Well, he made the request.

Mr. Wright: Counsel is testifying—

Mr. Ewing: I said I would withdraw the question.

Trial Examiner Norwood: The question is withdrawn. Proceed.

By Mr. Ewing:

Q. State your reason, Mr. Wormser, for requesting the exemption from the provisions of the Code in regard to Section II of Article 7 and Schedule "A".

Mr. Wright: I object to that question. It has not been shown that this witness ever did object to those provisions.

Mr. Ewing: I said asking for the exemption, Mr.

2232 Wright. He wrote the letter.

Mr. Wright: It has never been established that he has.

Mr. Ewing: He certainly has, he wrote the letter.

Trial Examiner Norwood: Objection overruled. Your own reason is what he is asking for now.

The Witness: May I have the question read to me?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows: "State your reason, Mr. Wormser, for requesting the exception from the provisions of the Code in regard to Section II of Article 7 and Schedule 'A'.")

The Witness: The reason was there was a general aversion to incorporating in the Code of fair competition for the lead industry, and that refers to all the divisions of it, anything that had any relation to monopolistic practices or trade restrictions or other practices that might be considered normally reprehensible.

Mr. Wright: I object to that and move that it be stricken, your Honor, as a self-serving hearsay declaration which is obviously not responsive to the question.

Trial Examiner Norwood: This witness may give us the facts on which he bases that conclusion. It is a very
2233 broad conclusion and goes to the heart of the issues in this case and I am going to allow the motion to strike it.

Mr. Ewing: I will note an exception. I submit that this witness is not in a position to make any self-serving statement in the literal sense. He is not a respondent, the association is the Respondent. So that when he gives the reason Mr. Wright may regard it as self-serving.

Trial Examiner Norwood: He can't confine it to his reason.

Mr. Wright: This gentleman is an agent and employee of the Respondent.

Trial Examiner Norwood: He has attempted to give the reasons of the entire industry and I think it is a too serious matter to just treat it in that way.

Mr. Ewing: I will repeat the question limiting it to Mr. Wormser's own reasons for writing the letter.

Trial Examiner Norwood: Answer it from that point.

The Witness: I don't quite understand.

Mr. Ewing: I will rephrase the question.

By Mr. Ewing:

Q. Will you give us your own reason for writing the letter of September 18, 1934, requesting the National Recovery Administration to continue the exemption with

respect to Section II of Article 7 and Schedule "A"
2234 of the Lead Industry Code?

Q. I was instructed to do so by the pigment division, subject to the approval of our Code Authority members.

Q. Were you present at any discussion among the members of the Pigment Division at which that instruction was given to you?

A. Yes, sir.

Q. Did you hear what the representatives of the members said at that discussion?

A. Yes, sir.

Q. Will you state in words or in substance what was said in connection with the instruction?

A. Do you refer to the conversation leading up to the decision to instruct me to write this letter?

Q. That's correct, if you know.

A. I know this much—of course, what transpired 14 years ago—but the members were—

Trial Examiner Norwood: Now wait a minute. He just asked you to state what you remembered.

The Witness: I don't remember specifically.

Mr. Wright: May we take a short recess, your Honor?

Trial Examiner Norwood: We will take a short recess.

(Whereupon, a short recess was taken.)

2235 Trial Examiner Norwood: Come to order. Proceed.

Mr. Ewing: I will ask that these two sheets be marked Respondents' Exhibit 10-A and B for identification.

Trial Examiner Norwood: They will be so marked as Respondents' Exhibit 10-A and B.

(The documents referred to were marked Respondents' Exhibits 10-A and 10-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you the documents which have been marked 'Respondents' Exhibits 10-A and B for identification and ask you whether the originals thereof were received by you as secretary of the Code Authority?

A. Yes, sir; they were.

Mr. Ewing: I offer the two documents which have been marked Respondents' Exhibit 10-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, Your Honor, on the ground that they are irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled. They will be received in evidence as Respondents' Exhibits 10-A and B. Do you wish to substitute photostats for that?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: You may.

2236 (The documents referred to, heretofore marked RESPONDENTS' EXHIBITS 10-A AND 10-B for identification were received in evidence.)

By Mr. Ewing:

Q. I wish to direct your attention to that portion of the minutes of the meeting of September 25, 1934, of Respondents' Exhibit 9-E, and ask you to read to yourself the matter in the minutes under the heading "Executive order No. 6767.

A. Yes, sir.

Q. Did you advise Mr. Henderson as instructed by the Code Authority at that meeting in accordance with the statement in the minutes appearing under the heading "Executive order No. 6767"?

A. I did.

Q. I ask you to examine your minute book and see if it contains minutes of a meeting of the Code Authority held on November 16, 1934?

A. It does.

Q. I show seven photostats and ask you to examine them and state whether they are true copies of the minutes of that meeting (handing to witness)?

A. They are.

Mr. Ewing: I ask that they be marked Respondents' Exhibit 11-A to G for identification.

Trial Examiner Norwood: They will be marked 2237 Respondents' Exhibit 11-A to G for identification.

(The document referred to was marked Respondents' Exhibit 11-A, 11-B, 11-C, 11-D, 11-E, 11-F and 11-G for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer Respondents' Exhibit 11-A to G for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. It is immaterial and irrelevant.

Mr. Ewing: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Objection overruled. They will be received in evidence as Respondents' Exhibit 11-A to G.

(The document referred to, heretofore marked for identification Respondents' Exhibit 11-A, 11-B, 11-C, 11-D, 11-E, 11-F and 11-G, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you a bound pamphlet issued by the Government Printing Office and ask you—I will withdraw that question.

Mr. Ewing: I will ask that this bound pamphlet be marked Respondents' Exhibit 12 for identification.

2238 Trial Examiner Norwood: It will be marked for identification as Respondents' Exhibit 12.

(The document referred to was marked Respondents' Exhibit 12 for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer this pamphlet which is entitled "National Recovery Administration code of fair competition for the paint, varnish and lacquer manufacturing industry" in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object on the ground that it is irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled. It will be received in evidence as Respondents' Exhibit No. 12.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 12, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now I direct your attention, Mr. Wormser, to that portion of the minutes of the meeting of November 16, 1934, of the Code Authority appearing on Respondents' Exhibit 11-C, 11-D, 11-E and 11-F headed "Consideration of action of Paint Recovery Board to procure transfer of lead

2239 in oil to paint code" and ask you to read to yourself those minutes.

A. I have read it.

Q. Directing your attention to that portion of the

minutes which recites the authorization to you to write a letter to the National Recovery Administration, I ask you whether you wrote the letter so authorized?

A. I did.

Q. Was it sent to the National Recovery Administration?

A. Yes, sir.

Q. Directing your attention to the recital in the minutes to the effect that you stated that you had notified Mr. Janssen to the Paint Recovery Board's action quoting it, did you write such a letter to Mr. Janssen?

A. I did.

Q. Who was Mr. Janssen?

A. Deputy administrator of the National Recovery Administration and in charge of the lead code activities.

Q. When in your letter to the National Recovery Administration of November 19, 1934, appearing on Respondents' Exhibit 11-D and 11-E, you referred to "selling below cost provision" of the paint code, will you state whether Article 22 appearing on page 182 of Respondents' Exhibit 12 is the provision to which you referred (handing to witness)?

A. It is.

Q. Had the lead in oil industry been brought under 2240 the cost provisions of the paint code, what effect would that have had, if any, in your opinion on the price of white lead in oil?

Mr. Wright: I object to that question, Your Honor. It obviously calls for a conclusion on the part of the witness and he has not been established as a sufficient expert on the price of white lead in oil at that period to be able to make an intelligent answer to that question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Had the lead in oil industry been brought under the cost provisions of the paint code, what effect would that have had, if any, in your opinion on the price of white lead in oil?")

Mr. Wright: It obviously calls for an opinion and there has been no qualification of this witness as an expert.

Mr. Ewing: I submit there has been. He qualified himself yesterday as an expert.

Mr. Wright: He qualified himself yesterday as an expert engineer.

Mr. Ewing: Also as an expert in marketing and as the author of one of the outstanding texts on marketing.

Mr. Wright: He has not been qualified as an expert with regard to the conditions prevalent in the industry as of this period.

2241 Trial Examiner Norwood: I think he is an expert.

Mr. Wright: On prices?

Trial Examiner Norwood: Yes. Objection overruled. Answer the question.

The Witness: It would have raised the price of white lead.

Mr. Wright: I move that that answer be stricken, Your Honor, as an unsupported conclusion for which there is no foundation in the record.

Trial Examiner Norwood: Motion denied. He will ask him further about that.

By Mr. Ewing:

Q. Why would that have been the effect, in your opinion?

A. It would have brought the white lead in oil industry under the much stricter costing provisions of the paint code.

Mr. Wright: I move to strike that answer as not responsive.

Mr. Ewing: I think it is incomplete but it is certainly responsive.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:

"Q. Why would that have been the effect, in your

2242 opinion?"

"A. It would have brought the white lead in oil industry under the much stricter costing provisions of the paint code.")

Trial Examiner Norwood: Motion denied.

By Mr. Ewing:

Q. Are the provisions of Article 22 of the paint code, Respondents' Exhibit 12, those to which you have just referred (handing to witness)?

A. Yes, sir.

Q. Tell us how the application of those provisions to the white lead in oil industry would have increased the price of white lead in oil, in your opinion?

A. This particular provision of the paint code stipulated

the specific inclusion of a great many items in the cost of selling those items that come under the paint code such as all direct costs, power and labor depreciation, figured in accordance with the provisions of the Federal income tax laws plus the proper proportion of all factory expenses and so on and so forth, quite a list of items here, all designed to increase the maximum price of paint.

White lead in oil is distinctly competitive with mixed paint and always has been. It was quite obvious to us in the white lead industry that if the paint people had been successful in bringing white lead in oil under their
2243 own provisions they could have forced up the price of white lead and thereby made their competitive position more secure.

Mr. Wright: I object and move that the last part of that answer be stricken as not responsive in a volunteer statement as to what the paint code authority might have had and as to the competitive situation between paint and white lead in oil.

Mr. Ewing: I have no objection to striking out the final reference to the competitive situation but the rest of the answer is perfectly responsive.

Trial Examiner Norwood: You agree that it may be stricken?

Mr. Ewing: The final reference to the competitive situation of the paint industry as distinguished from the white lead in oil.

Mr. Wright: Read the answer.

(The reporter read the answer as follows:

"A. This particular provision of the paint code stipulated the specific inclusion of a great many items in the cost of selling those items that come under the paint code such as all direct costs, power and labor depreciation, figured in accordance with the provisions of the Federal income tax laws plus the proper proportion of all factory expenses and so on and so forth, quite a list of items here, all
2244 designed to increase the maximum price of paint.

"White lead in oil is distinctly competitive with mixed paint and always has been. It was quite obvious to us in the white lead industry that if the paint people had been successful in bringing white lead in oil under their own provisions they could have forced up the price of white lead and thereby made their competitive position more secure.")

Mr. Ewing: I have no objection to striking out "and thereby making their competitive position," etc.

Mr. Wright: It was beyond the scope of the question and it was a volunteer conclusion on the part of the witness for which there has been no proper basis laid.

Mr. Ewing: He was giving the reasons to what the effect would be.

Mr. Wright: He was stating what was in the minds of other people in his opinion.

Mr. Ewing: In his mind, it was his opinion.

Mr. Wright: It was his opinion as to what the paint people had in mind for the white lead people.

Mr. Ewing: It was the effect of the conclusion—

Trial Examiner Norwood: (Interposing) I think it can go in as this expert's opinion.

Mr. Wright: It isn't opinion evidence. That was a statement of fact of what was in the minds of people
2245 who are not involved in this case.

Trial Examiner Norwood: It is his reasons, as I understand it.

The Witness: Yes, sir.

Mr. Wright: It is obviously just a belief he had about a situation of facts according to his own answer on it.

Trial Examiner Norwood: I will deny the motion. This is received as his belief. This is his opinion about the situation.

By Mr. Ewing:

Q. Is there any other reason why bringing white lead in oil under the paint code would force the price up?

A. You mean outside—

Q. (Interposing) Of what you have just stated.

A. Well, there was another inclusion here of a sentence that I should like to read to you—

Q. (Interposing) You are reading from what?

A. I am reading from Article 22 of selling below the cost provision of the paint code.

Q. Which is Respondents' Exhibit 12.

A. "There shall also be included in the cost a proportion of the general and administrative expenses, such proportion to be determined and to be recommended by the Paint Industry Recovery Board to the administrator for approval."

2246 Mr. Ewing: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Will you look at the minute book, Mr. Wormser, and tell us whether there was any meeting of the Code Authority held after the Supreme Court declared the NRA unconstitutional?

A. What day, Mr. Ewing?

Q. May or early June 1935.

A. We had an informal meeting on June 11, 1935.

Q. Have you the minutes of that informal meeting?

A. Yes, sir.

Mr. Ewing: I ask that these photostats be marked Respondents' Exhibit 13-A to D for identification.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 13-A to D for identification.

(The photostats referred to were marked Respondents' Exhibits 13-A, 13-B, 13-C and 13-D for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you these papers which have been marked Respondents' Exhibits 13-A to D inclusive for identification and ask you whether they are correct copies of the minutes of the informal meeting of June 11, 1935 2247 and of the attached two letters (handing to witness)?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibits 13-A to D for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, Your Honor, on the ground that they are immaterial and irrelevant. They contain nothing related even remotely to the issues in this matter.

Mr. Ewing: It is directly relevant on the charge that we commenced certain practices during code days and continued them afterwards.

Mr. Wright: If offered for that purpose then it is incompetent as well.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood. On the record. What have you to say?

Mr. Du Bose: It shows that they agreed to wind up the affairs of the Code Authority and return the statistics theretofore that had been gathered. It certainly shows how they regarded the NRA as distinguished from the respondents in some of these other cases.

Mr. Wright: How does the fact that they sent back the documents to the Code Authority have any bearing
2248 on the issue as to whether or not the conspiracy was continued after the NRA? This doesn't mention anything about the NRA continuance or a non-continuance.

It has absolutely no bearing on the subject.

Mr. Du Bose: All of the documents tending to show conspiracy according to the Commission's allegations and contentions deal with meetings of committees which were called to consider the code. This shows that the Code Authority was wound up bang when the Schecter decision came down.

Mr. Wright: Your Honor, there is not one scintilla of evidence that I can recall at any rate on the conspiracy here which relates to the activities of the Code Authority. Now this is the Code Authority and the evidence of conspiracy relates to meetings of the various divisions of the Lead Industries Association.

There is no indication that the Lead Industries Association—

Trial Examiner Norwood: (Interposing) Does this substantially wind up this NRA angle?

Mr. Ewing: Yes, Your Honor.

Trial Examiner Norwood: I will overrule the objection and receive Respondents' Exhibit 13-A to D in evidence.

2249 (The photostats referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 13-A, 13-B, 13-C and 13-D, were received in evidence.)

Trial Examiner Norwood: That was on June 27th?

Mr. Du Bose: May 27th.

By Mr. Ewing:

Q. I show you Respondents' Exhibit 13-C and ask you whether you received the original thereof (handing to witness)?

A. I did.

Q. I direct your attention to the last paragraph of the minutes appearing on Respondents' Exhibit 13-A and B and I ask you whether you did return to each member of

the industry, the labor statistics furnished it, if any, from time to time at the request of the Code Authority?

A. I did.

Q. Other than the statistical matter about which you have already testified, what statistics or reports, if any, did the Code Authority require of its membership?

A. None other than labor statistics.

Q. Was the Code Authority liquidated subsequent to June 11, 1935?

A. Yes, sir.

Q. As far as you know was there at any time after June 11, 1935, any attempt made by members of the Lead Industries Association to continue any of the activi-
2250 ties authorized by the code?

A. None whatsoever.

Q. That is as far as you know?

A. As far as I know, yes.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 14 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 14 for identification.

(The document referred to was marked Respondents' Exhibit 14 for identification.)

Mr. Ewing: I ask that you mark this as Respondents' Exhibit 15-A and B for identification.

Trial Examiner Norwood: It will be marked as Respondents' Exhibit 15-A and B for identification.

(The document referred to was marked Respondents' Exhibit 15-A and 15-B for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you this document marked Respondents' Exhibit 14 for identification and ask you if you received that (handing to witness)?

2251 A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 14 for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object to that, Your Honor. It is absolutely irrelevant and immaterial and incompetent. It can't

prove anything that has anything to do with this case. On its face it is a letter.

Mr. Ewing: It is a letter from the Department of Justice with respect to the organization of the lead industries.

Mr. Wright: What the Department of Justice might have thought of the Lead Industries Association from 1928 or at any other time has no bearing with regard to a conspiracy in this matter.

Trial Examiner Norwood: Will this be connected up?

Mr. Ewing: Yes.

Mr. Wright: How can it possibly be connected up and made material?

Trial Examiner Norwood: I will overrule the objection and receive Respondents' Exhibit 14 for identification in evidence.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 14, was received in evidence.)

2252

Mr. Wright: Is that subject to connection, Your Honor?

Trial Examiner Norwood: Yes.

By Mr. Ewing:

Q. Did you reply to the letter, Respondents' Exhibit 14 in evidence?

A. Yes, sir; I did.

Q. I show you Respondents' Exhibit 15-A and B for identification and ask you if that is a copy of your reply (handing to witness)?

A. It is.

Mr. Ewing: I offer Respondents' Exhibit 15-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I made the same objection to this. It is a self-serving statement in the form of a letter which can have absolutely no materiality or relevancy to the issues in this case.

It is incompetent as proof relating to any issue in the matter. We already have in the record the constitution and by-laws of the Lead Industries Association.

Trial Examiner Norwood: Does this witness say anything here that he couldn't tell us directly?

Mr. DuBose: If Your Honor please, the complaint
2253 in count No. 1, paragraph 7, subdivision "B" says that these respondents used the Lead Industries Asso-

ciation as a medium to agree on certain practices which are in restraint of trade.

We believe that these documents as well as others that we will offer later show the complete background and activities of the Lead Industries Association, how it was organized, how from the beginning the facts were revealed to everybody in all governmental agencies, how it operated, and how it could not have been used by these respondents or any other group as a medium to engage in practices in restraint of trade.

There is a broad allegation in the complaint and we feel we are entitled to cut off any possible inference that might be drawn by our failure to show the complete record of the Lead Industries Association.

Trial Examiner Norwood: Is it necessary to show every activity of the Lead Industries in order to negative the charge as to one of its activities?

Mr. DuBose: No, sir. But this is a request from the Department of Justice which is engaged in prosecuting trade associations which foster restraint of trade. They asked us, "What are your purposes?"

We wrote them back and had a meeting with them. We sent them a statistical report and they gave us a reserve carte blanche.

2254 Mr. Wright: Your Honor, how in the world could a reserve carte blanche or any correspondence between this Association and the Department of Justice in 1928 relating to the general objectives of the Association have any effect or any bearing by any stretch of the imagination on a conspiracy which occurred in 1933 and 1934?

Trial Examiner Norwood: I think you are going too far along this line.

Mr. DuBose: If Your Honor please, there is in evidence by the Commission an Exhibit No. 92 which is a report of the Stockholders Committee of the American Smelting and Refining Company and which is not a respondent in this case, admitted for the purpose of showing background.

It was a majority report. There is also in evidence Commission's Exhibit 24 which is a history of the American Smelting and Refining Company that goes back—purports to be a history—as far as 1906 or 1900 which purports also to show some background. I say if those two documents are admissible all of this material is admissible on

the ground of showing purpose on these respondents as well as others on the formation of the Lead Industries Association.

Mr. Wright: Your Honor, I don't really have any serious objection to this correspondence because I don't believe it proves anything. But if we are going to permit this record to be burdened with letters and statements
2255 from all the people who might say that they know of no purpose on the part of these respondents or the Lead Industries Association to engage in any combination or conspiracy, it is going to be an endless proposition.

It has no probative value and it has no relevance.

Trial Examiner Norwood: I don't see that this adds anything to what you have already put in with respect to the background.

Mr. Wright: I might say that the same considerations apply to Respondents' Exhibit 14.

Trial Examiner Norwood: I think I will reverse my ruling on Exhibit 14 and sustain the objection on this for the time being. If it appears to be relevant later on, we can take it in.

Mr. DuBose: Your Honor, in admitting Exhibit 24 and 92, Your Honor ruled that they were to be admitted subject to connection; that if they were not connected they would be subject to a motion to strike.

Trial Examiner Norwood: That is right.

Mr. DuBose: All we ask for is the same treatment with respect to these exhibits.

Trial Examiner Norwood: I think I will sustain the objection to that for the time being.

Mr. DuBose: Exception.

2256 Trial Examiner Norwood: And I will reverse the ruling on Exhibit 14 which was merely a connecting paper here and leave that out now.

Mr. Ewing: I suggest a recess at this time until 2:00 o'clock, Your Honor.

Trial Examiner Norwood: We will recess at this time until 2:00 o'clock.

(Whereupon, at 12:20 o'clock p. m., a recess was taken until 2:00 p. m., this day.)

2257 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order. Proceed.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. DuBose: I ask that this be marked Respondent's Exhibit 16 for identification.

Trial Examiner Norwood: It will be so marked.

(The document referred to was marked Respondent's Exhibit No. 16 for identification.)

Mr. DuBose: I ask that this document be marked Respondent's Exhibit 17 for identification.

Trial Examiner Norwood: It will be so marked for identification.

(The document referred to was marked Respondent's Exhibit 17 for identification.)

Mr. DuBose: And that these others be marked respectively Respondents' Exhibits 18, 19, 20, 21, 22 and 23 for identification.

Trial Examiner Norwood: They will be so marked.

(The documents above referred to were marked Respondents' Exhibits 18, 19, 20, 21, 22 and 23, for identification.)

Trial Examiner Norwood: Proceed.

2258 FELIX E. WORMSER, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. DuBose.

Q. Mr. Wormser, I show you Respondent's Exhibit 16 for identification and ask you what it is? Just identify it (handing same to witness).

A. It is a letter to me from the assistant to the Attorney General, Mr. William J. Donovan, dated October 2, 1928.

Q. I show you Respondent's Exhibit 17 for identification and ask you what that is (handing same to witness)?

A. It is a letter from me to Col. Donovan, Assistant

Attorney General of the United States, dated December 6, 1928.

Q. Is it a copy of a letter?

A. A copy of a letter, I am sorry.

Q. I show you Respondent's Exhibit 18 for identification and ask you what that is (handing same to witness)?

A. A letter from Col. Donovan to me dated December 8, 1928.

Q. I show you Respondent's Exhibit 19 for identification and ask you what that is?

A. A letter to me from Col. Donovan dated December 15, 1928.

Q. I show you Respondent's Exhibit 20 for identification and ask you what that is?

2259 A. This is a copy of a letter from me to Col. Donovan, Assistant to the Attorney General, dated December 20, 1928.

Q. I show you a document marked Respondent's Exhibit 21 for identification and ask you what that is?

A. This is a copy of a letter to Col. Donovan, Assistant to the Attorney General, from me dated January 18, 1929.

Q. I show you a document marked Respondent's Exhibit 22 for identification and ask you what that is?

A. This is a letter from Col. Donovan, Assistant to the Attorney General, to me, dated January 26, 1929.

Q. I show you a document marked Respondent's Exhibit 23 for identification and ask you what that is?

A. This is a copy of a letter from me to Col. Donovan, Assistant to the Attorney General, dated February 2, 1929.

Mr. DuBose: I offer in evidence Respondent's Exhibits for identification 16, 17, 18, 19, 20, 21, 22 and 23 and, at the same time, I reoffer Exhibits which were ruled upon prior to the noon recess, Respondent's Exhibit 14 for identification and 15-A and B for identification as being all part of the same general line of correspondence with the Department of Justice at or about the time of the formation of the Lead Industries Association.

In that connection, or rather, in connection with the reoffer of exhibits for identification 14 and 15-A and
2260 B, I should like to call your Honor's attention to the second paragraph of Respondent's Exhibit 15-A for identification. May I ask one more question of the witness on these documents?

Trial Examiner Norwood: Yes.

By Mr. DuBose:

Q. Mr. Wormser, in connection with this correspondence of the Department of Justice which has been marked Respondent's Exhibits for identification 14 through 23 inclusive, are these records kept in the regular course of business by the Lead Industries Association?

A. They are.

Mr. DuBose: I now reoffer them along the same lines that I did before.

Mr. Wright: Your Honor, all of these exhibits are in the same category and I renew my objection to them on the same grounds that I stated before. I would like to call your attention to a statement which appears in Respondent's Exhibit 19 for identification, namely, in the letter which has been identified as being received by Mr. Wormser from the Assistant to the Attorney General William J. Donovan, dated December 15, 1928, where it is stated that the Department's—

Mr. DuBose: I don't think there should be any statement about what the exhibit shows until it is in 2261 evidence.

Mr. Wright: I submit that you are calling the attention of the Examiner to paragraphs in those earlier exhibits and I should have the same right. I am calling your Honor's attention to the third paragraph of Respondent's Exhibit 19, particularly which illustrates that these papers have absolutely no relevancy as to the question of whether or not there was at that time, or has ever been subsequently, any combination or conspiracy or unlawful purpose on the part of the Lead Industries Association or any member of it. It simply has no probative value and it is a waste of our time to receive it in the record.

Mr. DuBose: In connection with Mr. Wright's statement that these exhibits do not contravene any purpose that the Lead Industries Association might have had, I again call your Honor's attention to the second paragraph in Respondent's Exhibit 15-A.

Mr. Wright: I might say that the fact that the Lead Industries Association may have written letters to 130,000,000 people at the time of its organization stating what their purpose were, would have no probative value in the question that we have presented here, namely, as to what has been done by the association in subsequent years.

Mr. DuBose: Well, this, your Honor, is a con-
2262 temporaneous document kept in the regular course of business and for that purpose may be employed to show purpose of the minds of the members of the Lead Industries Association at the time of the formation of that association.

Mr. Wright: It is not a part of the res gestae. It doesn't qualify in that way at all if that is what counsel's intention is.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I will reserve the ruling on the last exhibits proffered here, Respondent's Exhibits 14 to 23 inclusive, until tomorrow morning and in the meantime I will study the papers and see if I can see any points of relevancy.

Mr. DuBose: May I state on the record that in the Sugar Institute case, the Respondents were permitted to prove the circumstances surrounding the formation and organization of the Sugar Institute where there it was claimed that the Institute was formed at the instigation of the Department of Justice.

Trial Examiner Norwood: How did they prove that? What kind of evidence did they use?

Mr. DuBose: I don't know. I never studied the record, but I know they were allowed to prove it.

2263 Trial Examiner Norwood: Well, you should be allowed to prove that here, certainly you should.

This goes to the character of this evidence.

Mr. Wright: There is a statement of the purposes of the organization in the constitution and by-laws which are already contained in the record.

Trial Examiner Norwood: Proceed with your exhibits.

Mr. DuBose: We have no other exhibits to offer at this time and I request that we go off the record as to the future procedure here.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Your Honor, while the reporter is marking various documents at the request of counsel for the Respondent, National, for identification, I should like to make a motion to adjourn until 10 o'clock tomorrow morning.

Trial Examiner Norwood: The motion is allowed. We will now adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 2:30 o'clock, p. m., a recess was taken until April 24, 1947, at 10:00 o'clock, a. m.)

2264

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 24, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company, and Eagle Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2264-A E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for the Glidden Company.

2265 PROCEEDINGS.

Trial Examiner Norwood: Come to order.

Pursuant to adjournment of yesterday, the hearing in Docket No. 5253 is now convened in Room 605, Bar Association Building, 38 West 44th Street, New York, N. Y., at 10 o'clock, a. m., April 24, 1947.

The appearances are as follows:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

I have read these Respondent exhibits 14 to 23, and while I have not changed my opinion as to its relevancy to the vital issues in the case, I think in an investigation of this kind that counsel for the Respondents, if they insist, might be permitted to put that in. So I am overruling the objection and receiving those exhibits in evidence without setting any precedent for myself in case I think that the investigation is getting too broad.

Mr. Wright: Exception.

2266 Trial Examiner Norwood: Let the record show that Respondent's Exhibits 15-A and B, 16 to 23 inclusive are received in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 15-A, 15-B, 16, 17, 18, 19, 20, 21, 22, and 23 for identification, were received in evidence.)

Trial Examiner Norwood: Proceed.

FELIX E. WORMSER was thereupon recalled as a witness for the Respondent, and having been previously sworn, resumed the stand and testified further as follows:

Mr. Ewing: Mark this for identification as Respondent's Exhibits 24-A to 69-B inclusive.

Trial Examiner Norwood: They will be so marked.

(The documents referred to were marked RESPONDENT'S EXHIBITS 24-A, 24-B, 24-C; 25-A, 25-B, 25-C;

26-A, 26-B, 26-C, 26-D; 27-A, 27-B, 27-C, 27-D, 27-E; 28-A, 28-B, 28-C, 28-D; 29-A, 29-B; 30-A, 30-B, 30-C, 30-D, 30-E, 30-F, 30-G, 30-H, 30-I, 30-J; 31-A, 31-B, 31-C, 31-D, 31-E; 32; 33-A, 33-B, 33-C, 33-D, 33-E, 33-F, 33-G; 34-A, 34-B, 34-C, 34-D, 34-E, 34-F, 34-G, 34-H, 34-I; 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G; 36; 37-A, 37-B; 38-A, 38-B, 38-C, 38-D, 38-E, 38-F, 38-G, 38-H, 38-I, 38-J, 38-K,
2267 38-L, 38-M, 38-N, 38-O, 38-P, 38-Q; 39-A, 39-B, 39-C, 39-D, 39-E, 39-F, 39-G, 39-H, 39-I, 39-J; 40-A, 40-B, 40-C, 40-D, 40-E, 40-F, 40-G, 40-H; 41-A, 41-B, 41-C; 42-A, 42-B, 42-C, 42-D, 42-E, 42-F, 42-G, 42-H, 42-I, 42-J, 42-K, 42-L; 43-A, 43-B, 43-C, 43-D; 44-A, 44-B, 44-C, 44-D, 44-E, 44-F; 45-A, 45-B, 45-C, 45-D, 45-E, 45-F, 45-G, 45-H, 45-I, 45-J; 46-A, 46-B; 47-A, 47-B, 47-C, 47-D, 47-E, 47-F, 47-G; 48-A, 48-B, 48-C, 48-D, 48-E; 49-A, 49-B, 49-C, 49-D, 49-E; 50-A, 50-B, 50-C, 50-D, 50-E, 50-F, 50-G, 50-H, 50-I, 50-J, 50-K, 50-L, 50-M, 50-N, 50-O, 50-P; 51-A, 51-B; 52-A, 52-B, 52-C, 52-D, 52-E, 52-F, 52-G, 52-H, 52-I, 52-J, 52-K, 52-L, 52-M, 52-N, 52-O; 53-A, 53-B; 54-A, 54-B, 54-C, 54-D, 54-E, 54-F, 54-G; 55; 56-A, 56-B, 56-C, 56-D, 56-E, 56-F, 56-G; 57-A, 57-B, 57-C, 57-D, 57-E, 57-F; 58-A, 58-B, 58-C, 58-D, 58-E, 58-F, 58-G, 58-H, 58-I, 58-J, 58-K, 58-L, 58-M, 58-N, 58-O; 59-A, 59-B, 59-C, 59-D, 59-E, 59-F, 59-G; 60-A, 60-B, 60-C, 60-D, 60-E, 60-F, 60-G, 60-H, 60-I, 60-J, 60-K; 61-A, 61-B, 61-C, 61-D, 61-E, 61-F, 61-G, 61-H, 61-I; 62-A, 62-B, 62-C, 62-D, 62-E, 62-F, 62-G, 62-H, 62-I, 62-J, 62-K, 62-L, 62-M, 62-N; 63-A, 63-B, 63-C, 63-D, 63-E, 63-F, 63-G, 63-H, 63-I, 63-J; 64-A, 64-B, 64-C, 64-D, 64-E, 64-F, 64-G, 64-H; 65-A, 65-B, 65-C, 65-D, 65-E, 65-F, 65-G, 65-H, 65-I, 65-J, 65-K, 65-L, 65-M, 65-N, 65-O; 66-A, 66-B, 66-C, 66-D, 66-E, 66-F; 67-A, 67-B, 67-C, 67-D, 67-E,
2268 67-F, 67-G; 68-A, 68-B, 68-C, 68-D, 68-E, 68-F, 68-G, 68-H, 68-I, 68-J; 69-A, 69-B for identification.)

Direct Examination (Continued) by Mr. Ewing.

Q. Mr. Wormser, I show you Respondent's Exhibit 15-A, and direct your attention to the second paragraph (handing same to witness).

A. Yes, sir.

Q. Were you present at any meeting leading up to the organization of the Lead Industries Association?

A. Yes, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Do you know of your own knowledge what the feeling among producers and consumers of lead was with respect to the matters referred to in the second paragraph of Respondent's Exhibit 15-A? That will call for a yes or no answer.

A. Yes.

Mr. Wright: I object to that, your Honor, and move that it may be stricken. What the producers of lead might have had in mind about the objectives of the association has nothing to do with respect to these Respondents
2269 insofar as one of them, I believe, is also a producer of lead.

Trial Examiner Norwood: The objection came after the answer and he is merely stating that he has that knowledge. I think that the question and the answer may stand. Now, what seems to be coming up is another question which we will consider when it does come. Proceed.

By Mr. Ewing:

Q. Is your answer still the same? That is, yes? If in using the word "producers" in my question I use it in the broad sense so as to include the miners, smelters and makers of lead products.

A. My answer still stands as yes.

Q. Will you state what the feeling was with respect to the matters referred to in the second paragraph of Respondent's Exhibit 15-A?

A. The feeling of producers with respect to the contents of the second paragraph of this letter was that the objectives outlined here were along their own personal ideas.

Q. I hand you the minute book of the Board of Directors' meeting of the Lead Industries Association, Mr. Wormser, and ask you to examine Respondent's Exhibit 24-A to C and state whether it is a correct copy of the minutes of the directors' meeting of the association held on November 14, 1928?

Mr. Wright: I object, y Honor. That has not been identified as the minute boo t except by counsel.

2270 Mr. Ewing: Do you want me to ask him if that is the minute book—I will be happy to do that.

Trial Examiner Norwood: The question is, are those the minutes?

Mr. Ewing: I understood that he wanted me to ask Mr. Wormser what this book is so that these would be a basis for comparison.

Mr. Wright: Your Honor, my purpose was that the minutes should be identified before there was testimony as to whether or not this was a true copy of the same. That is, those particular minutes.

By Mr. Ewing:

Q. Will you look at the minute book and state whether there was a directors' meeting on November 14, 1928 and if so, whether you have the minutes?

A. Yes, sir; there was a meeting of the directors on November 14, 1928. I have the minutes here.

Q. Will you compare the photostats, Respondent's Exhibit 24-A to C for identification with the original minutes of November 14, 1928 and state whether the photostats are correct copies?

A. They are.

Q. Who acted as secretary at that meeting?

A. I did.

Mr. Ewing: I offer Respondent's Exhibit 24-A to 2271 C for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I object to the introduction of this exhibit into evidence since it is wholly irrelevant and immaterial to any issue involved in the case.

Mr. Ewing: Our position is the same with respect to these minutes as it was with regard to the Code Authority minutes. We wish to show, and I think we are entitled to show, the nature of the activities of the Lead Industries Association in some detail so as to indicate what it did and what its directors were trying to have it do.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 24-A to C. Objection overruled.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBIT 24-A, 24-B and 24-C for identification, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Will you state whether in determining the membership of the Board of Directors of the Lead Industries Association any consideration was given to geographic and product representation?

A. Yes, sir.

Q. What consideration was given to the question
2272 of representation?

A. Consideration was given to the wide scope of the membership so that all products represented in it would find representation on the board and also so that the geographical areas, inasmuch as we were a nation-wide organization, would have representation.

Q. Now, I ask you to look at the minute book and see if you have the minutes of the meeting of the Board of Directors of February 20, 1929?

A. Yes, sir.

Q. I show you three documents which have been marked Respondent's Exhibit 25-A to C for identification, and ask you whether they are correct copies of the minutes of that meeting?

A. They are.

Q. Who acted as secretary at that meeting?

A. I did.

Mr. Ewing: I offer Respondent's Exhibit 25-A to C for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor. There is absolutely nothing in this document in any way related to any issue in this case. There is no action by that association that is even remotely related to any issue in the case.

2273 Trial Examiner Norwood: What do you want to show by this?

Mr. Ewing: The same as before. We were faced with the problem in a sense of proving a negative and to establish the character of this association and what it did. We propose to show exactly what it did do.

Mr. Wright: Mr. Ewing, is it your intention to put in evidence the complete minutes of the Lead Industries Association from the date of its organization down to now?

Mr. Ewing: I propose to offer all the directors' minutes and the executive committee minutes and the annual meeting minutes. No, in some cases, as it appears on the

face of this, they are blank as far as the direct bearing on the issues here are concerned but—

Mr. Wright: I object to that on the ground that it clutters the record. I am sure that the activities that we are talking about never did appear in the minutes of the whole organization which was not primarily concerned with pigments.

Mr. Ewing: You have put in certain minutes of pigments meetings and other meetings, and we have put in so far the meetings under the Code Authority. Your very statement just now suggests the kind of contention that we are going to have to meet that there were other minutes and other meetings. Now, I say that a showing of the
2274 records of the association of its executive committee, its Board of Directors and its annual meeting taken with the meetings of the Code Authority and the offers made by the Commission at least enables us to meet, as far as possible as we can, the innuendo and inference which he has drawn.

As far as cluttering the record is concerned, the Commission has already put in thousands of papers and we are not going to have any substantial documentation as compared with theirs.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Hinds: If your Honor please, on an issue of conspiracy where both the proponent and those having the negative necessarily are going to rely on inferences, although we shall also have definite negative testimony, it seems to me that we want to find out what sort of people these conspirators were.

As Mr. Du Bose says, you want to show that as far as there is any record, their acts show they are innocent of these charges and they show constructive purposes to show what type of men they are. Now, very fine men may rob a bank. Now, it renders this less probable and under that theory it seems to me that a negative showing is pertinent.

Mr. Wright: If it is the witness' intention or if
2275 it is counsel's intention to identify the whole minute book and offer it in evidence, I would have no serious objection to that.

Mr. Ewing: I intend to identify all of the directors' minutes in this book from the first meeting, which is in

already, to April 1946. We have photostats of all of them and we will have a complete set for Mr. Wright. Some of them will be the subject of comparatively few specific questions as far as I am concerned.

Trial Examiner Norwood: This proffer is pending here with regard to Respondent's Exhibit 25-A to C. The objection is overruled and they will be received in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 25-A, 25-B, and 25-C for identification, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, I show you Respondent's Exhibit 26-A to 69-B inclusive for identification and I ask you to take these photostatic copies of the minutes and compare them with the minutes in the original minute book that you have and state first whether all of the minutes of all of the meetings are contained in this list of exhibits for identification which I have just referred to of the directors' meetings.

2276 Mr. Ewing: May we have a short recess, your Honor, to permit the witness to examine the exhibits?

Trial Examiner Norwood: We will take a short recess in order to permit the witness to examine the exhibits.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: On the record. Answer the question.

The Witness: They are.

By Mr. Du Bose:

Q. I offer in evidence Respondent's Exhibits for identification 26-A to D, 27-A to E, 28-A to D, 29-A and B, 30-A to J, 31-A to E, 32, 33-A to G, 34-A to I, 35-A to G, 37-A and B, 38-A to Q, 39-A to J, 40-A to H, 41-A to C, 42-A to L, 43-A to D, 44-A to F, 45-A to J, 46-A and B, 47-A to G, 48-A to E, 49-A to E, 50-A to P, 51-A and B, 52-A to O, 53-A and B, 54-A to G, 56-A to G, 57-A to F, 58-A to O, 59-A to G, 60-A to K, 61-A to I, 62-A to N, 63-A to J, 64-A to H, 65-A to O, 66-A to F, 67-A to G, 68-A to J, 69-A and B, which are photostatic copies of all of the minutes of the meetings of the Board of Directors of the Lead Industries Association from May 29, 1929 to and including April 26, 1946.

May I on the record amend the offer to eliminate Re-

spondent's Exhibit 45-A to J for identification since that is already in the record.

Trial Examiner Norwood: It may be considered withdrawn but the other exhibit numbers will still retain the numbers as originally given to them. Proceed.

2277

Mr. Wright: I would like to ask the witness one or two questions on the voir dire.

Trial Examiner Norwood: Proceed.

Mr. Wright: Did I understand you to state that these were all of the minutes of the Lead Industries Association from May 29, 1929 to April 26, 1946?

The Witness: Of the Board of Directors.

Mr. Wright: There were other organizations or divisions of the Lead Industries Association which kept minutes?

The Witness: Yes, sir.

Trial Examiner Norwood: That is exclusive of the one that was withdrawn there?

Mr. Du Bose: That is on the record, I believe, your Honor.

Mr. Wright: That was not one of the minutes.

Mr. Du Bose: That was annexed to one of the minutes.

Mr. Wright: Your Honor, I object to these exhibits on the ground that they are incompetent and immaterial and on the further ground that it is obvious from the face of them, by examining them, that they are not the best evidence of the activities of these Respondents in the Lead Industries Association.

2278

Now, I direct your attention to the minutes of the Board of Directors in the period from 1933 to 1934, which are barren of any of the activities which are shown to have been engaged in by the two committees of the Pigments Division during that period. In other words, these documents are a source of information which don't have any bearing on the issues. They are not the best evidence as to what was being done.

Mr. Du Bose: You mean they are not the best evidence of what you claim is being done.

Mr. Wright: Of what was being done by the association.

Mr. Hinds: It is the best evidence of what was not done.

Mr. Wright: They are good evidence of what was not done.

Mr. Hinds: Splendid evidence.

Trial Examiner Norwood: They are evidence of what was done with regard to these committees at these meetings.

Mr. Wright: No, sir. These are minutes of the Board of Directors, the governing body of the whole Lead Industries Association which has been testified here covers the mining and smelting and processing of lead in all its phases and not just the activities of the producers and sellers of pigments.

2279 The producers and sellers of pigments' activities are covered in the minutes of the Pigments Division and the sub-committees.

Trial Examiner Norwood: Counsel has the privilege to get those minutes and put them in evidence if he wants to. I said these minutes, in connection with my previous remarks, these are evidence of what happened at these meetings and I think they are as good evidence as you can get.

Mr. Wright: If your Honor please, if you will examine the minutes there of 1933 and 1934, it will appear obvious that it doesn't reflect what the pigments producers were doing at that time since we already have some minutes of that period of the Pigments Division. The minutes of the Board of Directors in that period are barren of any activities of the Pigments Division.

Trial Examiner Norwood: What have you to say to that, Mr. Ewing?

Mr. Ewing: I say in answer to that that it is true, of course, that there was a Pigments Division and that Mr. Wright has offered evidence in the form of minutes of meetings of the dry white lead group and the white lead in oil sub-committee. But it is also true that the Pigments Division is represented and the Board of Directors, as Mr. Wright says, is the governing body of the

2280 association and to show the nature of the association's work and its activities generally, I say as I have said before, that these minutes are pertinent.

Trial Examiner Norwood: Objection overruled. The exhibits will be received as marked. That is, Respondent's Exhibits for identification 26-A to 69-B, with the exception of Respondent's Exhibit 36, 45-A to J and Respondent's Exhibit 55.

(The documents above referred to, heretofore marked RESPONDENT'S EXHIBITS 26-A, 26-B, 26-C, 26-D;

27-A, 27-B, 27-C, 27-D, 27-E; 28-A, 28-B, 28-C, 28-D; 29-A, 29-B; 30-A, 30-B, 30-C, 30-D, 30-E, 30-F, 30-G, 30-H, 30-I, 30-J; 31-A, 31-B, 31-C, 31-D. 31-E; 32; 33-A, 33-B, 33-C, 33-D, 33-E, 33-F, 33-G; 34-A, 34-B, 34-C, 34-D, 34-E, 34-F, 34-G, 34-H, 34-I; 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G; 37-A, 37-B; 38-A, 38-B, 38-C, 38-D, 38-E, 38-F, 38-G, 38-H, 38-I, 38-J, 38-K, 38-L, 38-M, 38-N, 38-O, 38-P, 38-Q; 39-A, 39-B, 39-C, 39-D, 39-E, 39-F, 39-G, 39-H, 39-I, 39-J; 40-A, 40-B, 40-C, 40-D, 40-E, 40-F, 40-G, 40-H; 41-A, 41-B, 41-C; 42-A, 42-B, 42-C, 42-D, 42-E, 42-F, 42-G, 42-H, 42-I, 42-J, 42-K, 42-L; 43-A, 43-B, 43-C, 43-D; 44-A, 44-B, 44-C, 44-D, 44-E, 44-F; 46-A, 46-B; 47-A, 47-B, 47-C, 47-D, 47-E, 47-F, 47-G;

2281 48-A, 48-B, 48-C, 48-D, 48-E; 49-A, 49-B, 49-C, 49-D, 49-E; 50-A, 50-B, 50-C, 50-D, 50-E, 50-F, 50-G, 50-H, 50-I, 50-J, 50-K, 50-L, 50-M, 50-N, 50-O, 50-P; 51-A, 51-B; 52-A, 52-B, 52-C, 52-D, 52-E, 52-F, 52-G, 52-H, 52-I, 52-J, 52-K, 52-L, 52-M, 52-N, 52-O; 53-A, 53-B; 54-A, 54-B, 54-C, 54-D, 54-E, 54-F, 54-G; 56-A, 56-B, 56-C, 56-D, 56-E, 56-F, 56-G; 57-A, 57-B, 57-C, 57-D, 57-E, 57-F; 58-A, 58-B, 58-C, 58-D, 58-E, 58-F, 58-G, 58-H, 58-I, 58-J, 58-K, 58-L, 58-M, 58-N, 58-O; 59-A, 59-B, 59-C, 59-D, 59-E, 59-F, 59-G; 60-A, 60-B, 60-C, 60-D, 60-E, 60-F, 60-G, 60-H, 60-I, 60-J, 60-K; 61-A, 61-B, 61-C, 61-D, 61-E, 61-F, 61-G, 61-H, 61-I; 62-A, 62-B, 62-C, 62-D, 62-E, 62-F, 62-G, 62-H, 62-I, 62-J, 62-K, 62-L, 62-M, 62-N; 63-A, 63-B, 63-C, 63-D, 63-E, 63-F, 63-G, 63-H, 63-I, 63-J; 64-A, 64-B, 64-C, 64-D, 64-E, 64-F, 64-G, 64-H; 65-A, 65-B, 65-C, 65-D, 65-E, 65-F, 65-G, 65-H, 65-I, 65-J, 65-K; 65-L, 65-M, 65-N, 65-O; 66-A, 66-B, 66-C, 66-D, 66-E, 66-F; 67-A, 67-B, 67-C, 67-D, 67-E, 67-F, 67-G; 68-A, 68-B, 68-C, 68-D, 68-E, 68-F, 68-G, 68-H, 68-I, 68-J; 69-A, 69-B, for identification, were received in evidence.)

2282 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I ask you to turn to the minutes of the directors' meeting of October 1, 1930, photostatic copies of which are in evidence as Respondents' Exhibit 31-A to E inclusive.

A. I have it.

Q. And I ask you to state whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to sub-paragraph 5 of your

report as set forth in these minutes which appears on Respondents' Exhibit 31-C.

A. I have it.

Q. And ask you to read it to yourself.

A. I have read it.

Q. Where did you obtain the figures referred to in that paragraph?

A. From the statistics of the U. S. Bureau of Mines.

Q. I call your attention to the statement in that paragraph to the effect that the white lead business is an important outlet for lead, and ask you to explain what you meant by that statement?

A. I meant by that that the manufacture of white lead at this particular time was one of the most important
2283 outlets for the lead miner in the United States in the sale of pig lead.

At times it was the principal outlet. But during this period I think it was ranked second or third. But at any rate, it was and still is, as a matter of fact, one of the major outlets for the lead miners of the United States.

Q. I call your attention to your reference in that paragraph to the statement to the effect—I will withdraw the question.

I call your attention to the statement in that paragraph to the effect that one of the principal objects for which the Association was organized was to combat substitution of inferior articles for lead. What inferior articles were substituted for white lead in the manufacture of paint?

A. Inerts were generally the substitutes for white lead and by that I mean such materials as calcium carbonate or chalk or magnesium silicate which is a transparent material when mixed with linseed oil, and we have found from our survey that paint manufacturers in the United States were using vast amounts of material as that to, frankly speaking, adulterate their paints.

And I can just illustrate what I mean by citing some analyses from the North Dakota Regulatory Department which is an office in the State of North Dakota. In
2284 fact, this condition that I describe of the sale of inferior paints reached such a point in the State of North Dakota that the citizens of North Dakota passed strict paint laws which required the manufacturers to print the labels on the cans so the farmer would at least know what he was purchasing.

And the State of North Dakota periodically publishes an

analysis of the paints that are made in their state. Now here is one of their bulletins and I should just like to quote this; Here is a paint that is made in Chicago, Illinois. It contains 25-7/10 per cent water which shouldn't belong in any paint because it evaporates the minute it is applied. It contains 4/6 per cent of lithopone; it contains 1/10 of a per cent of zinc oxide which is a fine pigment.

It does, however, contain 28-9/10 per cent of calcium carbonate which is perfectly transparent when mixed with linseed oil and brushed on a wall, and it contains 23.7 per cent of siliceous material.

Q. What is siliceous material?

A. Siliceous material is a material containing Sio_2 which is the chemical designation for silicate. It might be magnesium silicate of potassium silicate.

That happens to be an illustration of a paint that has no lead in it, and I would like to give you another one to show you what we were up against as lead producers in the United States. Here is an exterior paint made by one 2285 of the largest companies in the United States.

This only contains 3.19 per cent water but let's skip that. It also contains lithopone, 31.06 per cent; zinc oxide, 8.95 per cent; titanium barium, 7 per cent; it contains 1.54—that is a little over ½ of 1 per cent of white lead presumably so that they could say they had some white lead in it.

And then they loaded the can with magnesium carbonate, 9.64 per cent and, again, insoluble siliceous material, 39 or 40 per cent.

Mr. Wright: May I inquire if the companies are designated in that document from which you are reading?

The Witness: This is the S. S. Kresge Company of Detroit, Michigan.

Trial Examiner Norwood: Is that the so-called dollar paint?

The Witness: No price is mentioned there. It is a very poor quality paint and the name is of no matter here, but to illustrate my point that that was going all over the United States. White lead happens to be one of the most expensive pigments that you can put in paint and naturally if a paint manufacturer can get away with using a cheaper material and an adulterant in excess of the amount of inerts and cheapening his product there is a great temptation to do so.

2286 By Mr. Ewing:

Q. Will you explain to us the difference between ready mixed paint and white lead in oil?

A. Ready-mixed paint is paint that is sold in cans and contains enough linseed oil and turpentine which are generally the two vehicles that are used to make it suitable for immediate application to the surface. White lead in oil, however, is sold in concentrated form.

It has to be diluted by the addition of linseed oil or turpentine before it can be made of the proper consistency to be applied to the surface.

Q. Ready-mixed paint is subject to application by a person having no particular technical skill, does that not hold true?

A. That is correct, sir.

Q. Whereas, the contrary is the case with the white lead in oil?

A. It requires some skill in the formulation of white lead in oil for whatever surface you happen to plan to use it upon or other factors such as exposure.

Q. I direct your attention to the minutes of the directors of December 7, 1931 which have been marked Respondents' Exhibit 35-A to G inclusive in evidence.

A. Yes, sir.

Q. And ask you whether you acted as secretary

2287 at that meeting?

A. I did.

Q. Will you look at item 3 of the secretary's report included in the minutes which appears on Respondents' Exhibit 35-C?

A. I have read it.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. What was the purpose of adopting specifications for lead pipe, Mr. Wormser?

A. The purpose was to restore some semblance or some order out of the chaos which existed and the fact that there were several specifications in use throughout the U. S. The specifications had no uniformity.

In fact, they were a bit misleading. Unless a person was thoroughly aware of what he was buying because the thicknesses did not allow for varying pressures in the pipe

we decided that we would so adopt a standard so that anybody in the United States buying pipe, if he bought it of a certain "A" classification, would always stand 50 pounds pressure, and if he bought it double "A" it would stand 75, and if he bought it triple "A" it would stand 100 pounds.

2288

And the reason for that was that people not being familiar with the varying standards would very often buy a pipe which was not designed for their pressure and the home owner might have a failure in his line which would be very expensive.

So we established these standards of our own as the Lead Industries Association standards and subsequently at the suggestion of the Bureau of Standards established it as a commercial standard of the Bureau of Standards.

Q. Did the Department of Commerce approve for promulgation this standard adopted by the Lead Industries Association?

A. Yes, sir.

Q. Do you know when?

A. I don't recall the date.

Q. I direct your attention to the minutes of the meeting of the Board of Directors of June 15, 1933.

A. I have it.

Q. Did you act as secretary at that meeting?

A. Yes, sir.

Q. I direct your attention to the report made by you which appears in the minutes and in particular to item No. 1 which appears on Respondents' Exhibit 42-A and B.

A. Yes, sir.

2289

Q. I then call your attention to the resolutions—I will withdraw that.

I then call your attention to that portion of the minutes which appears in two paragraphs at the top of Respondents' Exhibit 42-F and ask you whether you yourself attended conferences and hearings in Washington in connection with the submission and subsequent approval of the proposed Lead Industry Code?

A. Yes, sir.

Q. I ask you to direct your attention at the minutes of the meeting of the Board of Directors of June 15, 1934.

A. Yes, sir.

Q. Did you act as secretary at that meeting?

A. Yes, sir.

Mr. Wright: What exhibit is that?
Mr. Ewing: Respondents' Exhibit 46-A and B.

By Mr. Ewing:

Q. I direct your attention to the paragraph which appears on Respondents' Exhibit 46-A immediately preceding the nominations for membership on the Executive Committee.

A. Yes, sir.

Q. You will note the reference to division chairmen.

A. Yes, sir.

Q. What divisions were represented on the Code Authority?

A. I recall the Mining Division, the Smelting and
2290 Refining Division, the Lead Pigments Division and the Metallic Lead Products Division.

Q. And the representatives of those divisions plus the Executive Committee together constituted the Code Authority; is that right?

Mr. Wright: I object to that as a leading question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. And the representatives of those divisions plus the Executive Committee constituted the Code Authority; is that right?")

Mr. Ewing: I will withdraw the question.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I call to your attention the minutes of the Board meeting of January 9, 1934, Respondents' Exhibits 43-A to D inclusive and ask you whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to the last page of the minutes where it sets forth the representation on the Code Authority by divisions and ask you whether a reading of that refreshes your recollection as to the divisions included?

A. It does.

Q. Will you now state the divisions represented
2291 on the Code Authority?

A. Mining Division, Smelting and Refining Division, Pigments Division, Metallic Lead Products Division and Foil Division. I forgot the Foil Division.

Q. I direct your attention to the minutes of the meeting of the Board of Directors of October 1, 1935.

A. Yes, sir.

Q. That is Respondents' Exhibit 50-A to P inclusive. I ask you whether you acted as secretary at that meeting?

A. I did.

Q. I ask you to read to yourself paragraph 1 of your report which appears on the second page of the minutes, Respondents' Exhibit 50-B.

A. Yes, sir. I have read it.

Q. Were you in charge of the activities referred to therein?

A. Yes, sir.

Q. To what is the reference to statistical reports to be returned to members?

A. That referred to labor records gathered by the Code Authority.

Q. I call your attention to pages 5 and 6 of the minutes, Respondents' Exhibit 50-E and F, and ask you to read the matter under the heading "Correspondence division of review NRA."

Mr. Wright: Your Sonor, I object to the witness 2292 simply reading so much material into the record which already appears in these exhibits.

Mr. Ewing: I can't ask him questions about it unless he familiarizes himself with it.

Trial Examiner Norwood: I don't think he should read from the minutes.

Mr. Ewing: I am just simply asking him to read to himself.

Trial Examiner Norwood: Go ahead.

The Witness: I have read it.

By Mr. Ewing:

Q. Was the letter from Dr. Marshall which appears as Respondent's Exhibit 50-F, the subject of discussion at that meeting?

A. Yes, sir.

Q. And did the members of the Board of Directors of the Association who were present at that meeting direct you to reply to Dr. Marshall?

A. They did.

Mr. Wright: I object, Your Honor, to this line of questioning. The minutes themselves show what was under

discussion at the meeting and what the directions were to the secretary. This is simply a rehash of what is in the minutes.

Trial Examiner Norwood: He may give us any
2293 further information about those matters.

Mr. Wright: That is the point of my objection, Your Honor, that it isn't further information.

Trial Examiner Norwood: Objection overruled. Go ahead.

By Mr. Ewing:

Q. Did you send to Dr. Marshall the letter quoted in the minutes at page 7 and 8? That is, Respondents' Exhibit 50-K and L.

A. I did.

Q. Does that letter correctly set forth the statements and opinions expressed by the members of the Board of Directors of the Lead Industries Association present at that meeting?

A. Absolutely.

Q. I direct your attention to the statement which appears in the fourth paragraph of that letter.

A. I have it.

Q. To the effect that steps were being taken to draft a code for the industry pursuant to urgent representations by National Recovery Administration officials and ask you whether you know that statement to be correct of your own knowledge?

A. It is an absolutely true statement.

Q. State whether the opinion stated in the sixth paragraph of that letter which appears on page 8 of the
2294 minutes and on Respondents' Exhibit 50-L, was the opinion expressed by the members of the Board of Directors of the Lead Industries Association present at that meeting?

A. It was.

Q. Was the feeling set forth in the last paragraph of the letter on page 8 of the minutes, Respondents' Exhibit 50-L, the feeling expressed and stated by the members of the Board of Directors of the Association present at that meeting?

A. It was distinctly their feeling.

Q. I direct your attention to page 10 of the minutes under the heading "Correspondence," Respondents' Exhibit 50-N.

A. I have it.

Q. Did you, in fact, receive the telephone request referred to in that portion of the minutes?

Mr. Wright: I object, Your Honor. The letter itself says so.

Mr. Ewing: The minutes reported that he received a telephonic request and I want him to testify here whether he did.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Did you, in fact, receive the telephone request referred to in that portion of the minutes?")

Mr. Wright: The exhibit that is in evidence al-
2295 ready shows that he reported that he received a telephonic request.

Mr. Ewing: If you raise no question about that I will withdraw the question.

Trial Examiner Norwood: Objection overruled. Let him answer the question.

The Witness: I did.

By Mr. Ewing:

Q. Did you send to Mr. Janssen the letter set forth on page 11 of the minutes, Respondents' Exhibit 50-O?

A. I did.

Q. I direct your attention to the minutes of the meeting of December 23, 1936.

A. I have it.

Q. Did you act as secretary at that meeting?

A. I did.

Q. I direct your attention to your report, Exhibit A annexed to the minutes of the meeting, Respondents' Exhibit 52-G, and in particular to paragraph 2.

A. I have two paragraphs marked 2. To what page do you refer, Mr. Ewing?

Q. Page 4 of Exhibit A.

A. I have it.

Q. Will you tell us what the paint company referred to therein was?

2296 A. That was a company which was developed with the cooperation of the Principal Lumber Industries of the United States designed to do all we could mutually to correct this situation which I have previously described of the sale of paint which wasn't doing the public any

good, wasn't doing the lumber industry any good, and wasn't doing us any good.

So we worked with the West Coast Lumbermen's Association, the Red Cedar Shingle Bureau, the Southern Pine Association, the Western Pine Association and numerous other lumber associations, even the Retail Lumber Associations, we all banded together to do what we could to correct this situation.

Q. I refer you to the minutes of the Board of Directors meeting of January 24, 1939, Respondents' Exhibit 58-A to O.

A. I have it.

Q. And I ask you whether you acted as secretary at that meeting?

A. I did.

Q. I direct your attention to Respondents' Exhibit 58-E, the first page of Exhibit A annexed to the minutes of the meeting.

A. I believe I have it.

Q. And ask you to read to yourself the second paragraph of paragraph 2.

2297 A. Yes.

Q. In what form, if you know, was the recommendation of the Federal Trade Commission referred to therein made?

Mr. Wright: I object, Your Honor. I don't see what materiality or relevancy the subject of that question has to this case.

Mr. Ewing: It appears to be a quotation.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. In what form, if you know, was the recommendation of the Federal Trade Commission referred to therein made?")

Mr. Wright: I might add that the exhibit refers to some statistical report which is not further identified in the exhibit.

Trial Examiner Norwood: He can tell what form it is in, can't he?

Mr. Wright: It has nothing to do with the issues in this case, Your Honor. That is the point of my objection. It is entirely unrelated.

Trial Examiner Norwood: Objection overruled. Go ahead.

The Witness: May I answer it?

Mr. Ewing: Yes.

The Witness: This was a public announcement of
2298 the Federal Trade Commission.

By Mr. Ewing:

Q. Do you know in what form?

A. I don't recall the exact form in which it was made.

Q. I direct your attention to the minutes of the meeting of May 16, 1939, Respondents' Exhibit 59-A to G and ask you whether you acted as secretary at that meeting?

A. I did.

Q. I call your attention to the first page of Exhibit A, Respondents' Exhibit 59-C to the matter under the heading "White lead promotion program" and ask you to state briefly what that program was?

A. That program was a joint cooperative effort sponsored by the mining companies and the white lead in oil companies to promote the use of white lead throughout the United States by pointing out its virtues to the American public by means of an advertising campaign, literature and through other means.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. DuBose: Mark this for identification.

Trial Examiner Norwood: They will be marked with the appropriate numbers for identification.

2299 The documents referred to were marked Respondents' Exhibits 70-A, 70-B, 71-A, 71-B, 71-C, 72-A, 72-B, 72-C, 72-D, 73-A, 73-B, 73-C, 74-A, 74-B, 74-C, 75-A, 75-B, 75-C, 76-A, 76-B, 77-A, 77-B, 77-C, 77-D, 77-E, 77-F, 77-G, 77-H, 77-I, 77-J, 77-K, 77-L, 78-A, 78-B, 78-C, 78-D, 78-E, 79-A, 79-B, 79-C, 79-D, 80-A, 80-B, 80-C, 80-D, 80-E, 80-F, 80-G, 80-H, 80-I, 80-J, 80-K, 80-L, 80-M, 80-N, 80-O, 80-P, 81-A, 81-B, 81-C, 82-A, 82-B, 82-C, 82-D, 82-E, 83-A, 83-B, 83-C, 83-D, 83-E, 83-F, 83-G, 83-H, 83-I, 83-J, 83-K, 83-L, 83-M, 83-N, 83-O, 83-P, 83-Q, 83-R, 83-S, 83-T, 83-U, 83-V, 83-W, 83-X, 83-Y, 83-Z, 83-Z-1, 83-Z-2, 83-Z-3, 84-A, 84-B, 84-C, 84-D, 84-E, 84-F, 84-G, 84-H, 84-I, 84-J, 84-K, 84-L, 84-M, 84-N, 84-O, 84-P, 84-Q, 84-R, 84-S, 84-T, 84-U, 84-V, 84-W, 84-X, 84-Y, 84-Z, 84-Z-1, 84-Z-2, 84-Z-3, 84-Z-4, 84-Z-5, 84-Z-6, 84-Z-7, 84-Z-8, 84-Z-9, 84-Z-10, 84-Z-11, 84-Z-12, 85-A, 85-B, 85-C, 85-D, 85-E, 85-F, 85-G, 85-H,

85-I, 85-J, 85-K, 85-L, 85-M, 85-N, 85-O, 85-P, 85-Q, 85-R, 85-S, 85-T, 85-U, 85-V, 85-W, 85-X, 85-Y, 85-Z, 85-Z-1, 85-Z-2, 85-Z-3, 85-Z-4, 85-Z-5, 85-Z-6, 85-Z-7, 85-Z-8, 85-Z-9, 85-Z-10, 85-Z-11, 85-Z-12, 85-Z-13, 86-A, 86-B, 86-C, 86-D, 87-A, 87-B, 87-C, 87-D, 88, 89-A, 89-B, 89-C, 89-D, 89-E, 89-F, 89-G, 89-H, 89-I, 89-J, 89-K, 90, 91-A, 91-B, 91-C, 91-D, 91-E, 91-F, 91-G, 91-H, 91-I, 91-J, 91-K, 91-L, 91-M, 91-N, 2300 91-O, 91-P, 91-Q, 91-R, 91-S, 91-T, 91-U, 91-V, 92-A, 92-B, 92-C; 93; 94-A, 94-B, 94-C; 95-A, 95-B; 96-A, 96-B; 97-A, 97-B, 97-C, 97-D, 97-E, 97-F, 97-G, 97-H, 97-I; 98-A, 98-B, 98-C, 98-D, 98-E, 98-F, 98-G, 98-H, 98-I, 98-J, 98-K, 98-L, 98-M; 99-A, 99-B, 99-C, 99-D, 99-E, 99-F, 99-G, 99-H, 99-I, 99-J, 99-K, 99-L, 99-M, 99-N, 99-O, 99-P; 100-A, 100-B, 100-C, 100-D, 100-E, 100-F, 100-G, 100-H; 101; 102-A, 102-B, 102-C, 102-D, 102-E, 102-F, 102-G, 102-H, 102-I, 102-J; 103-A, 103-B, 103-C, 103-D, 103-E, 103-F, 103-G, 103-H, 103-I, 103-J, 103-K, 103-L, 103-M, 103-N, 103-O, 103-P, 103-Q, 103-R; 104-A, 104-B, 104-C, 104-D, 104-E, 104-F, 104-G, 104-H, 104-I, 104-J, 104-K, 104-L; 105-A, 105-B; 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G, 106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O, 106-P, 106-Q, 106-R, 106-S, 106-T, 106-U; 107-A, 107-B, 107-C, 107-D, 107-E, 107-F, 107-G, 107-H, 107-I, 107-J, 107-K, 107-L, 107-M, 107-N, 107-O, 107-P, 107-Q and 107-R for identification.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Wormser, I show you Respondents' Exhibits for identification marked 70-A to 107-R inclusive and I ask you to take the original Executive Committee minutes and compare those minutes with these photostatic copies 2301 and tell us whether all of the minutes of the Executive Committee of the Lead Industries Association from January 7, 1929 to and including April 16, 1946, are included therein?

Trial Examiner Norwood: We will take a short recess at this time to allow the witness to look over the exhibits.

(A short recess was taken.)

Trial Examiner Norwood: On the record. We will recess at this time until 1:45 p.m.

(Whereupon, at 12:10 p.m., a recess was taken until 1:45 p.m., this day.)

2302 Afternoon Session.

1:45 P. M.

Trial Examiner Norwood: Come to order. Proceed.

FELIX E. WORMSER, a witness called on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. Have you examined the photostats marked Respondents' Exhibits 70-A and B, 71-A to C, 72-A to D, 73-A to C, 74-A to C, 75-A to C, 76-A to B, 77-A to I,—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Have you examined these to Respondent's Exhibit 107-R, and compared them with the original minutes of meetings of the Lead Industries Association from January 7, 1929 to April 16, 1946?

A. Yes, sir.

Q. Will you state whether the photostats are correct copies of the original minutes?

A. They are.

Mr. Ewing: I offer them in evidence.

Mr. Wright: Mr. Wormser, those are the complete minutes over that period of time of the executive committee?

2303 The Witness: Yes, sir.

Mr. Wright: Your Honor, I object to this unlimited offer of all these documents. In the first place, they contain a great deal of hearsay material and the reception of them in evidence will deprive me from the right of cross examination of the sources of the information which appear there. They don't come under any exceptions to the rule. They are papers which were prepared by parties having an interest in this proceeding and show on their face that a good many of them were prepared after the parties had notice of the Commission's interest in the practices which are the subject of this matter.

At least 99-9/10ths per cent of the information contained in the exhibits is wholly irrelevant and immaterial to any issue in this case. As illustrations of the highly irrelevant and immaterial information, I direct your Honor's attention to the document marked for identification as Respondent's Exhibit 73-A, Exhibit 106-A through various sub numbers, 104-G, which contains a great deal of material that has absolutely no part in this record.

Mr. Ewing: I don't think I have to add to what I have said before except to comment upon the fact that these are the minutes of the association showing what the association did, and that while it is true that some meetings were held and the minutes written after the Commission
2304 proceeding, and the proceeding may have been known from investigation earlier or later to any particular member, I think that is neither here nor there about them. They will show on their face what the parties were doing and intended to do and will show the attitude of the mind and the attempt of the association and the membership.

Mr. Wright: I might also state that at least one of the minutes appears on its face to be incomplete since it refers to exhibits which are not attached thereto. I am referring now to Respondent's Exhibit 94 for identification.

Trial Examiner Norwood: I want to say that with respect to these exhibits and also these other minutes that we received this morning and at other times, and minutes that we have received for the Commission, that they are conditioned in this respect that they are not to be considered as proving the truth of any of the hearsay statements which they contain. They are being received for the purpose of showing attitude and purpose. But if there are matters contained in those hearsay statements that you want to be considered on the issues in this case, you will have to furnish further evidence about them. So with that condition, I am overruling the objection and receiving Respondent's Exhibits 70-A to 107-R as variously lettered and shown in the reporter's list.

2305 (The documents referred to, heretofore marked RESPONDENTS' EXHIBITS 70-A, 70-B, 71-A, 71-B, 71-C, 72-A, 72-B, 72-C, 72-D, 73-A, 73-B, 73-C, 74-A, 74-B, 74-C, 75-A, 75-B, 75-C, 76-A, 76-B, 77-A, 77-B, 77-C, 77-D, 77-E, 77-F, 77-G, 77-H, 77-I, 77-J, 77-K, 77-L, 78-A, 78-B, 78-C, 78-D, 78-E, 79-A, 79-B, 79-C, 79-D, 80-A, 80-B, 80-C, 80-D, 80-E, 80-F, 80-G, 80-H, 80-I, 80-J, 80-K, 80-L, 80-M, 80-N, 80-O, 80-P,

81-A, 81-B, 81-C, 82-A, 82-B, 82-C, 82-D, 82-E, 83-A, 83-B, 83-C, 83-D, 83-E, 83-F, 83-G, 83-H, 83-I, 83-J, 83-K, 83-L, 83-M, 83-N, 83-O, 83-P, 83-Q, 83-R, 83-S, 83-T, 83-U, 83-V, 83-W, 83-X, 83-Y, 83-Z, 83-Z-1, 83-Z-2, 83-Z-3, 84-A, 84-B, 84-C, 84-D, 84-E, 84-F, 84-G, 84-H, 84-I, 84-J, 84-K, 84-L, 84-M, 84-N, 84-O, 84-P, 84-Q, 84-R, 84-S, 84-T, 84-U, 84-V, 84-W, 84-X, 84-Y, 84-Z, 84-Z-1, 84-Z-2, 84-Z-3, 84-Z-4, 84-Z-5, 84-Z-6, 84-Z-7, 84-Z-8, 84-Z-9, 84-Z-10, 84-Z-11, 84-Z-12, 85-A, 85-B, 85-C, 85-D, 85-E, 85-F, 85-G, 85-H, 85-I, 85-J, 85-K, 85-L, 85-M, 85-N, 85-O, 85-P, 85-Q, 85-R, 85-S, 85-T, 85-U, 85-V, 85-W, 85-X, 85-Y, 85-Z, 85-Z-1, 85-Z-2, 85-Z-3, 85-Z-4, 85-Z-5, 85-Z-6, 85-Z-7, 85-Z-8, 85-Z-9, 85-Z-10, 85-Z-11, 85-Z-12, 85-Z-13, 86-A, 86-B, 86-C, 86-D, 87-A, 87-B, 87-C, 87-D, 88, 89-A, 89-B, 89-C, 89-D, 89-E, 89-F, 89-G, 89-H, 89-I, 89-J, 89-K, 90, 91-A, 91-B, 91-C, 91-D, 91-E,
91-F, 91-G, 91-H, 91-I, 91-J, 91-K, 91-L, 91-M, 91-N,
2306 91-O, 91-P, 91-Q, 91-R, 91-S, 91-T, 91-U, 91-V, 92-A,
92-B, 92-C; 93; 94-A, 94-B, 94-C; 95-A, 95-B; 96-A, 96-B; 97-A, 97-B, 97-C, 97-D, 97-E, 97-F, 97-G, 97-H, 97-I; 98-A, 98-B, 98-C, 98-D, 98-E, 98-F, 98-G, 98-H, 98-I, 98-J, 98-K, 98-L, 98-M; 99-A, 99-B, 99-C, 99-D, 99-E, 99-F, 99-G, 99-H, 99-I, 99-J, 99-K, 99-L, 99-M, 99-N, 99-O, 99-P; 100-A, 100-B, 100-C, 100-D, 100-E, 100-F, 100-G, 100-H; 101; 102-A, 102-B, 102-C, 102-D, 102-E, 102-F, 102-G, 102-H, 102-I, 102-J; 103-A, 103-B, 103-C, 103-D, 103-E, 103-F, 103-G, 103-H, 103-I, 103-J, 103-K, 103-L, 103-M, 103-N, 103-O, 103-P, 103-Q, 103-R; 104-A, 104-B, 104-C, 104-D, 104-E, 104-F, 104-G, 104-H, 104-I, 104-J, 104-K, 104-L; 105-A, 105-B; 106-A, 106-B, 106-C, 106-D, 106-E, 106-F, 106-G, 106-H, 106-I, 106-J, 106-K, 106-L, 106-M, 106-N, 106-O, 106-P, 106-Q, 106R, 106-S, 106-T, 106-U; 107-A, 107-B, 107-C, 107-D, 107-E, 107-F, 107-G, 107-H, 107-I, 107-J, 107-K, 107-L, 107-M, 107-N, 107-O, 107-P, 107-Q, 107-R, were received in evidence.

Mr. Ewing: That is a perfectly reasonable condition and, as a matter of fact, that is why I have asked certain questions with respect to certain of the exhibits.

Trial Examiner Norwood: It would show what the association received and acted on, but it is not to show the truth of any of those hearsay statements.

2307 By Mr. Ewing:

Q. Mr. Wormser, will you turn to the minutes of the meeting of June 30, 1933, in evidence as Respondent's

Exhibit 75-A to C and tell us whether you acted as secretary at that meeting?

A. I did.

Q. I call your attention to the last paragraph on the first page being Respondent's Exhibit 75-A and ask you whether the divisions which you listed this morning were the divisions contemplated in that statement in the minutes?

A. They were.

Mr. Wright: I would like to request your Honor to make a short statement there since you mentioned the minutes which had heretofore been received in support of the complaint. Now, it is my contention that those minutes insofar as they may contain hearsay statements which are directly related to what we consider acts of conspiracy are within the well recognized exceptions to the hearsay rule and that they were so received in that they were admissions by the parties themselves.

Trial Examiner Norwood: Well, that is different. I said as proving the truth of said statements. They do prove maybe that the statements were made but I said they were not received to prove the truth of the statements. We are not lifting ourselves up by our own boot straps because of that.

2308 Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to the minutes of the executive committee meeting of July 24, 1933, Respondent's Exhibit 76-A and B, and in particular to the telegram quoted—set forth at the bottom of Exhibit 76-A and the top of Exhibit 76-B and ask you to state whether that telegram was sent to the members of the association?

A. It was.

Q. I direct your attention to the minutes of the meeting of the executive committee of July 28, 1933, Respondent's Exhibit 77-A to L. I specifically direct your attention to Respondent's Exhibits 77-C, D, E and F, and ask you to state what they represent.

A. They represent the proposed code of fair competition for the lead industry as submitted on August 31, 1933.

Q. And when you say "proposed code," do you mean the proposed master code or the proposed supplementary code?

A. The proposed master code.

Q. Was the proposed code to which reference has just been made, submitted to the National Recovery Administration?

A. Yes.

Q. I ask you to look at the minutes of the executive committee meeting of August 3, 1933, Respondent's Exhibit 78-A to E, and direct your attention particu-
2309 larly to the so-called President's re-employment agreement referred to in those minutes, Respondent's Exhibit 78-D and E, and I ask you to state whether that so-called re-employment agreement was the agreement referred to in the minutes of the executive committee meetings of July 24 and 28, 1933?

A. It was.

Q. Directing your attention to the second page, Respondent's Exhibit 78-B, will you state whether the telegram there set forth was sent?

A. It was sent.

Q. I direct your attention to the third page of the minutes, Respondent's Exhibit 70-C and in particular to the matter under the heading "Article IX, President's Code," and ask you to read it to yourself.

A. I have read it.

Q. Was the letter of which the portion of the minutes just indicated formed a part, sent to the National Recovery Administration?

A. Yes, sir.

Q. Will you explain the statement in the letter to the effect that the price of lead is established by the open world market?

A. Well, lead is a world commodity just like wheat, corn and cotton; just like a great many other staple products, and at that time there was a free and open mar-
2310 ket in London and the London price was really the governing price all over the world. The New York market here generally reflected the London price plus the influence of the tariff.

Q. In the reference in that portion of the minutes which you have just referred to, Article IX of the President's code, is the President's code the President's re-employment agreement?

A. It is synonymous.

Q. I call your attention to the fact that in the re-

employment agreement the article is described not as Article IX, but as Section IX.

A. Section IX, yes.

Q. But that is the provision of the re-employment agreement to which this letter has reference?

A. Yes, sir.

Q. I direct your attention to the minutes of the meeting of August 17, 1933, Respondent's Exhibit 80-A to P inclusive, and ask whether you acted as secretary at that meeting?

A. I did.

Q. You will note the notice referred to on the first page, Respondent's Exhibit 80-A.

A. Yes.

Q. After the receipt of formal order signifying approval of the petition of the Lead Industries Association for substitution under the President's re-employ-
2311 ment agreement, was that notice issued?

A. Yes, sir.

Q. Directing your attention to the third page of the minutes, Respondent's Exhibit 80-C and the next page, Exhibit 80-D, was the telegram referred to there sent?

A. Yes, sir.

Q. Referring to the bottom of the fourth page, Respondent's Exhibit 80-D and the fifth page, Exhibit 80-E, did you send the letter there set forth?

A. Yes, sir.

Q. I direct your attention to the meeting of the executive committee of November 6, 1933, Respondent's Exhibit 82-A to E.

A. Yes, sir.

Q. Did you act as secretary at this meeting?

A. Yes, sir.

Q. I direct your attention to the preceding meeting of September 21, 1933, Respondent's Exhibit 81-A to C, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. Referring to the bottom of the first page and the top of the second page, Exhibit 81-A and B, was that letter sent?

A. Yes, sir; it was sent.

Q. Prior to that, had the letter quoted on the
2312 first page been received by the association from the Recovery Administration?

A. It had been received.

Q. Referring back to the meeting of November 6, 1933, was the third draft of the supplementary code of fair competition for the lead pigments division approved at that meeting? The supplementary code referred to by the Recovery Administration in its letter quoted in the minutes of the meeting of September 21, 1933, and in the reply quoted in the same minutes.

A. Yes, sir.

Q. I call your attention to the reference on page 2 of the minutes of the meeting of September 21, 1933, Respondent's Exhibits 81-B, to Mr. Carter's outline of the serious conflict of interest between the paint code and the position of the white lead in oil industry. In that controversy or conflict of interest the conflict of interest about which you testified yesterday?

A. Yes, sir.

Q. I direct your attention to the minutes of the executive committee meeting of November 22, 1933, Respondent's Exhibit 83-A to 83-Z-3 and, in particular, to Exhibit "A" thereto annexed, Respondent's Exhibit 83-C to 83-Q inclusive, and ask you whether that is the code or draft of the code—I will withdraw that question.

2313 I call your attention to the fact that annexed to the minutes of this meeting are Exhibit "A," Respondent's Exhibits 83-C to Q inclusive and Exhibit "B" and Respondent's Exhibit 83-R to Z-3 inclusive, the former being designated as Code "D" and the latter, Code "E," and ask you to state which code was the code discussed by you with Mr. Janssen in Washington as recited by the minutes on the first page?

A. Code "A" was the one I discussed.

Q. When you say "Code 'A'"—

A. I mean Code "D" of Exhibit "A," that is what I meant.

Q. And what does Code "E," Exhibit "B" represent?

A. That represents some of the changes suggested by Deputy Administrator Janssen.

Q. In other words, it is a revision of Code "D"?

A. Yes, a revision of Code "D."

Q. I direct your attention to the minutes of the meeting of the executive committee of February 6, 1934.

A. Yes, sir.

Q. It consists of Respondent's Exhibits 85-A to 85-Z-13

inclusive. I ask you whether Code "H" annexed thereto, consisting of Respondent's Exhibits "D" to Z-1-3 inclusive, was the code finally submitted for approval? I will withdraw the question.

I direct your attention to Respondent's Exhibits
2314 "D" to "U" designated as Code "H" and Respondent's Exhibits "V" to "Z-13" designated as Code "I," and ask you which code was the one submitted for approval?

A. Code "I."

Q. I direct your attention to Article 7, Section 3, of Code "I," Respondent's Exhibit Z-6, page 11, Code "I."

A. I have it. What is the question?

Q. Are the reports referred to in that section the industrial reports furnished the Lead Industries Association by its members from its inception?

A. Yes, sir.

Q. I direct your attention to the executive committee meeting of February 8, 1934, Respondent's Exhibit 86-A to C.

A. Yes, sir.

Q. I direct your attention to page 3, Respondent's Exhibit 86-C, and page 4 of the minutes, Exhibit 86-D, and ask you whether the letter there set forth was written by you?

A. It was.

Q. And was it sent?

A. It was sent to Mr. Janssen.

Q. Was it prepared and sent to him at his solicitation?

A. Yes, sir.

Q. Upon what facts did you base your statement
2315 appearing in the second paragraph on the last page of the minutes, Respondent's Exhibit 86-D, to the effect that employment had been increased 21 per cent in the manufacturing groups?

A. That was based upon the receipt of questionnaires from the manufacturers requesting their labor records and indicating specifically the increase in employment brought about by their cooperation with the National Recovery Administration.

Q. Is that the basis for the other statements in that same paragraph?

A. Yes, sir.

Q. Upon what facts did you base your statement or esti-

mate that code wage increases would cost the members of the association a million and a half a year?

A. That statement was also based upon the results of a questionnaire circulated to the members of interest, specifically requesting that type of information.

Q. I direct your attention to the minutes of the meeting of March 14, 1934, Respondent's Exhibit 91-A to V inclusive.

A. Is that March 14, 1934?

Q. Yes, sir. And ask you when after March 14, 1934, the executive committee next met?

A. November 22, 1935.

Q. Do you know why the executive committee of the Lead Industries Association had no meetings during that interval?

A. Well, the meeting of March 14, 1934 was essen-
2316 tially in connection with NRA activities. In the interval, the NRA had been terminated by action of the Supreme Court and there was no occasion for the executive committee to meet to transact any other business.

Q. The Supreme Court's decision in the Schechter case came down in late May or early June 1935, and up to that time after the code was adopted and until November 1935, there was no meeting of the executive committee?

A. That is right.

Q. During the interim period, the Code Authority up until the Supreme Court's decision supervised the members of the lead industry, did it not?

Mr. Wright: I object to that.

Mr. Ewing: It is in anyway.

Trial Examiner Norwood: Did you finish your question?

Mr. Ewing: Yes.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"During the interim period, the Code Authority up until the Supreme Court's decision supervised the members of the lead industry, did it not?")

Mr. Ewing: I confess it is leading but it is in anyway. That is, the minutes of the Code Authority.

Trial Examiner Norwood: Do you insist on your
2317 objection?

Mr. Wright: Yes. I was not objecting so much to that phase of it. I know the minutes of the Code Authority meeting were in, but I still object to that question as

leading. I think counsel can get at that information by a perfectly proper means.

Mr. Hinds: As a guidance for further Respondent's testimony, there cannot be an objection in an administrative hearing like when a man is examining his own informed witness and there is no jury that the question is leading. Isn't it a great advantage to have all the questions leading?

Trial Examiner Norwood: That is the one time that he cannot lead.

Mr. Hinds: Certainly in the judicial system they encourage leading questions. It helps to save time. That is the only reason not to lead a witness because you don't want to have mendacious testimony before a jury.

Trial Examiner Norwood: Read the question, please.

(Whereupon, the reporter repeated the question.)

Trial Examiner Norwood: Objection sustained. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. I direct your attention, Mr. Wormser, to the 2318 minutes of the executive committee meeting of November 22, 1935.

A. Yes, sir.

Q. Did you act as secretary at that meeting?

A. I did.

Q. At the time of that meeting, did you know of the contents of the letter from Mr. George L. Berry dated November 7, 1935, referred to in the first paragraph of the minutes following the attendance listing?

A. Yes, sir.

Q. Does the statement in that first paragraph of the minutes of the meeting correctly set forth the substance of Mr. Berry's letter?

Mr. Wright: Your Honor, I object to questioning along this line. This is part of the material which I indicated before was wholly irrelevant and immaterial to the issues in this matter. It doesn't relate to the National Recovery Administration nor the issues in this case.

Mr. Ewing: In this particular instance, the question is directed at the letter which the association received from Mr. Berry advising of a conference scheduled in Washington designed to set up machinery to put the lead industry in

a position where it might sponsor in substance a continuance unofficially of the NRA. I wanted to ask the witness whether that statement here was a correct summary of the substance of that letter and then bring out what
2319 attitude the association took with respect to such a suggestion.

Mr. Du Bose: It is very pertinent.

Trial Examiner Norwood: And this was a letter that was written by whom?

Mr. Ewing: Mr. George L. Berry.

Trial Examiner Norwood: I think he can answer that.

Mr. Wright: It is a pious declaration of innocence by the parties involved.

Mr. Ewing: Not at all.

Trial Examiner Norwood: He is putting on his witness here to substantiate declarations of innocence. Objection overruled. Does that correctly state the situation?

The Witness: It does.

By Mr. Ewing:

Q. Who, if you now know, is Mr. George L. Berry?

A. As I recalled, he had an official capacity as the National Coordinator—was intimately involved with NRA activities.

Q. Was he coordinator for industrial cooperation?

A. I believe that was the title that he possessed.

Q. Now, I direct your attention to the preamble and resolution following that first paragraph and ask you
2320 to read them to yourself over to the middle of the next page.

A. I have read it.

Q. You were present at the executive committee's deliberations in connection with that resolution?

A. I was.

Q. Does the recital contained in the third paragraph of page 2 of the minutes, Respondent's Exhibit 92-B, correctly state the sentiments of the members of the executive committee as expressed by them at that meeting?

A. It does.

Q. Does the fourth paragraph on page 2 of the minutes, Respondent's Exhibit 92-B, correctly state the views of the members of the executive committee present at that meeting?

A. It does.

Q. Does the resolution immediately following, correctly

state the views of the members of the executive committee present at that meeting?

Trial Examiner Norwood: I think he should confine this to the views they expressed. He can't read their minds.

Mr. Ewing: I intended to include that in subsequent questions. I had that in the first question.

The Witness: May I answer it?

Trial Examiner Norwood: Have you amended the question?

2321 Mr. Ewing: I amended the question accordingly.

Trial Examiner Norwood: You may answer it.

The Witness: It does.

By Mr. Ewing:

Q. I direct your attention to the minutes of the executive committee meeting of June 22, 1936, and ask you whether you acted as secretary at that meeting?

A. I did.

Q. Now, I direct your attention to page 2 of the minutes, being Respondent's Exhibit 94-B, and in particular, to the matter under the heading "Wheeler Anti-basing Point Brief" and ask you to read it.

A. I have read it.

Q. Was the brief which the minutes recited as attached as Exhibit "A" ever presented to Congress?

A. No, sir.

Mr. Ewing: I might say that while referred to in the minutes as Exhibit "A," we did not photostat it because it was not used.

Mr. Du Bose: May we take a short recess, your Honor?

Trial Examiner Norwood: We will take a short recess.

(Whereupon, a short recess was taken.)

2322 Trial Examiner Norwood: Come to order. Proceed.

By Mr. Ewing:

Q. I direct your attention to the meeting of the Executive Committee of May 11, 1942, Respondents' Exhibit 98-A to M and, in particular, to the seventh page of the document designated as Exhibit A.

A. I have it.

Q. Will you tell us where you obtained the statistical information setting forth the comparative prices of lead and other commodities?

A. Partly from the Bureau of Labor Statistics and part-

ly from the statistics of the Engineering and Mining Journal.

Q. I direct your attention to the meeting of the Executive Committee of April 16, 1946, Respondents' Exhibit 107-A to R, and ask you to look at Exhibit A annexed and, in particular, to the appendix which is Respondents' Exhibit 107-N, and ask you to read to yourself sub-paragraphs A and C.

A. I have.

Q. With respect to sub-paragraph A, what is the basis for the statement that the average weight of the lead in a storage battery is 22 pounds?

A. That is based on statistics gathered by the American Bureau of Metal Statistics surveying the storage battery industry.

Q. And when you say "lead," to what do you refer?

2323 A. In that paragraph I refer to both pig lead plus the oxide lead, the total lead content of the storage battery.

Q. With respect to sub-paragraph C, what is the basis for your statement that the average exterior prepared paint contains about one and a half pounds of lead per gallon?

A. That is a statement based upon the expert opinion of laboratory men in our industry who deal with or who serve the prepared paint industry in paint formulation matters.

Q. From whom was the estimate obtained?

A. It was obtained from technicians in the National Lead Company and the Eagle Picher and the Glidden Company—I think that is about all.

Q. Is the same source or sources the basis for the statement in that sub-paragraph that pure white lead paint contains about 15 pounds of lead per gallon?

A. Yes, sir.

Mr. Du Bose: Your Honor, pursuant to the arrangement we made yesterday, I now substitute for the original of these exhibits, the photostatic copies which were made downstairs in the Photostatic Department of the City Bar Association.

These are Respondents' Exhibits 4-A and B, 5, 7-A, B and C, 8-A and B, 10-A and B.

Trial Examiner Norwood: They may be substituted and you may withdraw the originals by agreement with counsel.

Mr. Wright: I have no objection to that.

2324 Trial Examiner Norwood: Very well. Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, I show you a bound volume and I ask you what that is (handing to witness)?

A. That is a record of the annual meeting, minutes of the Lead Industries Association from its beginning to date.

Mr. Du Bose: Mark this for identification Respondents' Exhibits 108-A to 126-L.

(The documents referred to were marked for identification Respondents' Exhibits 108-A, 108-B, 108-C, 108-D, 108-E, 108-F, 108-G, 108-H, 108-I, 108-J, 108-K, 108-L, 108-M, 108-N, 109-A, 109-B, 109-C, 109-D, 109-E, 109-F, 109-G, 109-H, 109-I, 109-J, 109-K, 109-L, 109-M, 109-N, 109-O, 109-P, 110-A, 110-B, 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, 111-G, 111-H, 111-I, 111-J, 111-K, 111-L, 112-A, 112-B, 112-C, 112-D, 112-E, 112-F, 112-G, 112-H, 112-I, 112-J, 112-K, 112-L, 113-A, 113-B, 113-C, 113-D, 113-E, 113-F, 113-G, 113-H, 113-I, 113-J, 113-K, 113-L, 113-M, 113-N, 113-O, 113-P, 113-Q, 114-A, 114-B, 114-C, 114-D, 114-E, 114-F, 114-G, 114-H, 114-I, 114-J, 114-K, 114-L, 114-M, 114-N, 115-A, 115-B, 115-C, 115-D, 115-E, 115-F, 115-G, 115-H, 115-I, 115-J, 115-K, 115-L, 115-M, 115-N, 115-O, 115-P, 115-Q, 115-R, 115-S, 116-A, 116-B, 116-C, 116-D, 116-E, 116-F, 116-G, 116-H, 116-I,
116-J, 116-K, 116-L, 116-M, 116-N, 117-A, 117-B, 117-C,
2325 117-D, 117-E, 117-F, 117-G, 117-H, 117-I, 117-J, 117-K,
117-L, 117-M, 118-A, 118-B, 118-C, 118-D, 118-E, 118-F, 118-G, 118-H, 118-I, 118-J, 118-K, 119-A, 119-B, 119-C, 119-D, 119-E, 119-F, 119-G, 119-H, 120-A, 120-B, 120-C, 120-D, 120-E, 120-F, 120-G, 120-H, 120-I, 120-J, 120-K, 120-L, 120-M, 120-N, 120-O, 120-P, 121-A, 121-B, 121-C, 121-D, 121-E, 121-F, 121-G, 121-H, 121-I, 121-J, 121-K, 121-L, 122-A, 122-B, 122-C, 122-D, 122-E, 122-F, 122-G, 122-H, 122-I, 122-J, 122-K, 122-L, 123-A, 123-B, 123-C, 123-D, 123-E, 123-F, 123-G, 123-H, 123-I, 123-J, 123-K, 123-L, 123-M, 123-N, 124-A, 124-B, 124-C, 124-D, 124-E, 124-F, 124-G, 124-H, 124-I, 124-J, 124-K, 124-L, 125-A, 125-B, 125-C, 125-D, 125-E, 125-F, 125-G, 125-H, 125-I, 125-J, 125-K, 125-L, 125-M, 126-A, 126-B, 126-C, 126-D, 126-E, 126-F, 126-G, 126-H, 126-I, 126-J, 126-K and 126-L.)

By Mr. Du Bose:

Q. Mr. Wormser, I show you Respondents' Exhibits for identification marked 108-A to 126-L, and I ask you to compare these exhibits for identification with the minutes

of the annual meetings in the bound volume. By the way, let me ask you one more question.

These are the minutes of the annual meetings of the Lead Industries Association; is that correct?

A. That is correct.

2326 Trial Examiner Norwood: Do you wish to have a short recess to allow him to do that?

Mr. Du Bose: Yes, sir.

Trial Examiner Norwood: We will take a five-minute recess to allow the witness to examine the documents.

(A short recess was taken.)

Trial Examiner Norwood. Come to order. Proceed.

Mr. Wright: Mr. Wormser, do those exhibits which have been marked constitute a complete set of all the minutes of the general annual meetings of the Lead Industries Association?

The Witness: Yes, sir.

Mr. Wright: From the time of its inception down to date?

The Witness: Yes, sir.

Mr. Wright: There are no omissions from that?

The Witness: No omissions.

Mr. Wood: Is this cross-examination of the witness?

Mr. Wright: No, sir; it was examination on the voir dire.

Mr. Wood: Very well.

Trial Examiner Norwood: Proceed.

By Mr. Du Bose:

Q. Mr. Wormser, have you compared Respondents'
2327 Exhibits for identification 108-A to 126-L inclusive with the minutes of the annual meetings in the bound volume?

A. I have.

Q. And are they correct copies of the minutes of all of the annual meetings?

A. They are.

Mr. Du Bose: I offer in evidence Respondents' Exhibits 108-A to 126-L inclusive being the minutes of the annual meetings of the members of the Lead Industries Association from November 14, 1928 to and including April 26, 1946.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I make the same objection

to the offer of these that I made to the previous exhibits consisting of minutes of the Executive Committee and the Board of Directors of the Lead Industries Association for the reason that they contain a great many gratuitous and self-serving declarations which were made in contemplation of this proceeding and because of the Commission's investigation of the industry, and furthermore on the ground that they contain a great deal of hearsay material which is inadmissible on that ground.

For the most part it is irrelevant and immaterial.

Mr. Du Bose: If your Honor please, this is a supplement to the minutes of the meetings of the Executive
2328 Committee and the Board of Directors. It shows what occurred at the annual meetings, which, of course, took place every year.

Trial Examiner Norwood: I shall receive them under the same condition as to the hearsay evidence that is contained in them. I will overrule the objection and receive Respondents' Exhibits 108-A to 126-L inclusive.

(The documents referred to, heretofore marked for identification, RESPONDENTS' EXHIBITS 108-A, 108-B, 108-C, 108-D, 108-E, 108-F, 108-G, 108-H, 108-I, 108-J, 108-K, 108-L, 108-M, 108-N, 109-A, 109-B, 109-C, 109-D, 109-E, 109-F, 109-G, 109-H, 109-I, 109-J, 109-K, 109-L, 109-M, 109-N, 109-O, 109-P, 110-A, 110-B, 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, 111-G, 111-H, 111-I, 111-J, 111-K, 111-L, 112-A, 112-B, 112-C, 112-D, 112-E, 112-F, 112-G, 112-H, 112-I, 112-J, 112-K, 112-L, 113-A, 113-B, 113-C, 113-D, 113-E, 113-F, 113-G, 113-H, 113-I, 113-J, 113-K, 113-L, 113-M, 113-N, 113-O, 113-P, 113-Q, 114-A, 114-B, 114-C, 114-D, 114-E, 114-F, 114-G, 114-H, 114-I, 114-J, 114-K, 114-L, 114-M, 114-N, 115-A, 115-B, 115-C, 115-D, 115-E, 115-F, 115-G, 115-H, 115-I, 115-J, 115-K, 115-L, 115-M, 115-N, 115-O, 115-P, 115-Q, 115-R, 115-S, 116-A, 116-B, 116-C, 116-D, 116-E, 116-F, 116-G, 116-H, 116-I, 116-J, 116-K, 116-L, 116-M, 116-N, 117-A, 117-B, 117-C,
117-D, 117-E, 117-F, 117-G, 117-H, 117-I, 117-J, 117-K,
2329 117-L, 117-M, 118-A, 118-B, 118-C, 118-D, 118-E, 118-F,
118-G, 118-H, 118-I, 118-J, 118-K, 119-A, 119-B, 119-C, 119-D, 119-E, 119-F, 119-G, 119-H, 120-A, 120-B, 120-C, 120-D, 120-E, 120-F, 120-G, 120-H, 120-I, 120-J, 120-K, 120-L, 120-M, 120-N, 120-O, 120-P, 121-A, 121-B, 121-C, 121-D, 121-E, 121-F, 121-G, 121-H, 121-I, 121-J, 121-K, 121-L, 122-A, 122-B, 122-C, 122-D, 122-E, 122-F, 122-G, 122-H, 122-I, 122-J, 122-K, 122-L, 123-A, 123-B, 123-C,

123-D, 123-E, 123-F, 123-G, 123-H, 123-I, 123-J, 123-K, 123-L, 123-M, 123-N, 124-A, 124-B, 124-C, 124-D, 124-E, 124-F, 124-G, 124-H, 124-I, 124-J, 124-K, 124-L, 125-A, 125-B, 125-C, 125-D, 125-E, 125-F, 125-G, 125-H, 125-I, 125-J, 125-K, 125-L, 125-M, 126-A, 126-B, 126-C, 126-D, 126-E, 126-F, 126-G, 126-H, 126-I, 126-J, 126-K and 126-L, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. Mr. Wormser, you are familiar with the Eagle Picher Company?

A. Yes, sir.

Q. For how long have you been familiar with the Eagle Picher Company as a corporation?

A. Oh, since my mining days back in 1916.

Q. Now going back to the NRA period, what persons were acting on behalf of the Eagle Picher Company to your knowledge?

2330 A. Mr. Maston and Mr. Zoller, I believe—I think Mr. Bendelari.

Q. As a practical matter of dealing with them, what was your understanding of their authority?

A. Well, their authority was never made really clear to me, Mr. Wood. I don't know just how their authority stood.

In fact, at times there seemed to me that there was a little bit of divided authority if I may say so or a confusion of authority.

Q. Take Mr. Zoller, and again I direct your attention to the NRA days. What was Mr. Zoller's authority as you understood it at that time?

A. Mr. Zoller had charge of matters relating to the production of dry pigments as produced by the Eagle Picher Company and acted for the Eagle Picher Company, I believe, in the interests of those dry products.

Q. What was Mr. Zoller's age at that time, if you know?

A. I would say he must have been about forty years or thirty-five probably. It is just a guess.

Q. Was he an executive of the company at the time, do you know?

A. I think he was the manager of the Dry Products Division at the time.

Mr. Wright: Your Honor, I object. It is obvious that

this witness is not fully informed of exactly the rela-
2331 tionship that these men had to the company. He is being asked now by counsel for that company questions which he is obviously not in the proper position to testify to.

The last answer showed on its face that it was a conclusion and a guess on his part and I move that it be stricken.

Trial Examiner Norwood: Were you answering that from your memory or your own knowledge?

The Witness: Yes, sir.

Trial Examiner Norwood: Motion denied. This witness may state as a secretary of these meetings and this Association what was represented to him as the basis of the authority of these members. He may state if he knows if it came to him in the course of his duty what positions they occupied in this company, and counsel may show that by this witness.

Mr. Wood: Obviously, Your Honor, this witness' opinion of these people is not the best evidence and I have that well in mind. I am not asking that in order to prove his opinion. I am trying to get how it appeared to him at the time.

Trial Examiner Norwood: You may do that.

By Mr. Wood:

Q. Who today in the Eagle Picher Company are
2332 you dealing with in your capacity as secretary of the Lead Industries Association?

A. Mr. Wood, to answer that, I would have to ask you with what particular activity of it—to what particular activity of the company you refer. If it is the activities on the Board of Directors, Mr. Bendelari is the man I communicate with.

He has been appointed by your company to serve on the Board. If it is in connection with pigment activities it would be Mr. Zoller or Mr. Hayt. If it is in connection with the metallic lead products activities, it would be Mr. Murdock.

Q. Do you know Mr. Bowlby?

A. I do, yes, sir.

Q. How active is he in connection with Lead Industries?

A. I would say he is inactive.

Q. What is Mr. Bowlby's position as you understand it?

A. Mr. Bowlby is the president of the Eagle Picher Company.

Q. What is the position of Mr. Zoller and Mr. Hayt in relation to the position of Mr. Bowlby as you understand it?

A. Mr. Zoller, I believe, is a vice-president of the Eagle Picher Company and manager of their Dry Products Division. Mr. Hayt is the manager of the Lead in Oil Division.

Q. Now what was Mr. Zoller's position with the company, if you know, in 1933 and 1934?

2333 A. As I recall, he was manager of the Dry Products Division of the Eagle Picher operation.

Q. And what was Mr. Hayt's position in 1933 and 1934, if you know?

A. Manager of the white lead in oil activities of the Eagle Picher company.

Q. Are you sure of that?

A. Fairly sure, sir.

Q. What was Mr. Maston's position?

A. He was also connected with white lead in oil activities, I believe, as general sales manager.

Q. For how long a period did you know Mr. Maston?

A. From 1928 until his death.

Q. When was his death?

A. In 1939, I believe, or 1938, I am not quite certain about that.

Q. What was his position at the time of his death as you understood it?

A. I believe he was the sales manager of the White Lead in Oil Division.

Q. Are you sure of that?

A. Not positively.

Q. Or was he the New York representative?

A. He made his headquarters in New York and it might very well have been that he was the New York representative.

2334 Q. During the period in which you knew Mr. Maston, what was your impression of his authorization to speak for the company?

A. It was my belief that he had full authority to speak on those subjects on which he dealt with us in relation to Association activities and Code Authority activities.

Q. Did you recognize any diminution of authority during the period in which you knew him?

A. I believe before he died that there was some diminishment in his authority, but I can't say just what it amounted to, I can't recall.

Q. But you are under the impression that there was some change in his position in the company?

A. That is the impression I have, Mr. Wood, yes, sir.

Q. Were you ever told that he had been repudiated by the company?

A. No, sir.

Q. Now Mr. Maston wrote you a letter enclosing a map; is that correct?

A. Yes, sir.

Q. And do you know where that map is?

A. No, sir; I do not.

Mr. Ewing: There are two letters that refer to two maps. We know where one is.

Mr. Du Bose: One of them is in evidence as Exhibit 513-E.

2335 The Witness: All I recall is that he came to my office during Code Authority days and he said, "Felix, I think it would be wise for you to become acquainted with the manner in which white lead in oil is sold and how other pigments are sold, and I want to help you. Here is a zone map which should serve to help to educate you."

I received the map, I put it in my files and that was the end of it until the time that Mr. Dunn walked into my office and asked if I had a map and I told Mr. Dunn I had no map because it had completely escaped my memory, there having been no activity whatsoever in connection with a map.

I think I have already apologized to Mr. Dunn because I was mistaken. Mr. Dunn unearthed a map but I don't even know if that is the map that Mr. Maston supplied me with. It is so vague and so inconsequential that it seemed to me at that time and even today, so that is the complete history of the map until it was unearthed by Mr. Dunn or if it is the map.

I say the map although I don't really know whether it is the map that you refer to or whether it is the one that was attached to Mr. Maston's letter or what happened to, I don't know.

By Mr. Wood:

Q. What did Mr. Maston tell you about that map?

2336 Did he say that it was his own creation or what did he tell you about the map?

A. All I recall is that it was his map.

Q. His map?

A. It was his map.

Q. And you are familiar with the fact that the manufacturers of white lead in oil sell their products on a zone basis? Are you familiar with that?

A. I am familiar with that.

Q. To what extent did that map reflect the zone basis of the respondents?

A. Mr. Wood, I didn't even examine the map carefully. I just put it in the files and made just a blanket acknowledgment as I do most things that come to the office. I acknowledged it and thanked him for it.

That was the end of it because I had absolutely no use for it at that time. I was so immersed in so many other activities that I didn't want to take the time.

Q. Didn't Mr. Maston ask you to try to get the industry to adopt that map?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. What was his purpose? What purpose did he state as his purpose in giving you the map?

2337 A. Merely to acquaint me with the customs of the trade, you might say.

Q. Well, what was his representation as to what the map was supposed to portray? Was it a new scheme or was it a codification of the way business was done?

A. I would say it was a codification of the way business was done at that time in the pigments industry.

Q. Did Mr. Maston make any effort to get that zone map incorporated in the NRA code?

A. No, sir.

Q. Was that map ever adopted?

A. No, sir.

Q. Well, I will ask this rather broadly: What was the connection, if any, between that map and the way the lead companies are doing business today as far as selling is concerned?

A. I haven't any idea.

Q. Well, as a matter of fact, wasn't Mr. Maston more or less carrying a torch trying to get the industry to adopt a particular system of zone selling?

Mr. Wright: I object.

Trial Examiner Norwood: Sustained. It is leading.

By Mr. Wood:

Q. Do you know, Mr. Wormser, of any agreement made on behalf of the Eagle Picher Company to do business in any particular way as to the selling of white lead in
2338 oil? I mean as far as the zone system is concerned during the NRA days?

A. I know nothing about it, sir.

Q. Do you know of anyone connected with the Eagle Picher Company at the present time with whom you discussed the zone selling system during NRA days?

A. The only one I ever discussed it with, sir, is Mr. Maston. I haven't discussed it with anybody else in the Eagle Picher Company outside of discussing it with you here.

Mr. Wood: That is all.

By Mr. Ecker:

Q. Mr. Wormser, you have been secretary and treasurer of the Lead Industries Association since its formation?

A. Yes, sir.

Q. Would you know whether or not a given company or corporation is or has been a member of the Lead Industries Association?

A. I would.

Q. Will you state whether or not Anaconda Copper Mining Company has ever been a member of the Lead Industries Association?

A. They never have.

Mr. Ecker: That is all.

Mr. Ewing: We have some more documents and a little more oral testimony but is won't amount to very
2339 much. It was my thought that perhaps now is as good a time as any to adjourn to the morning because I am quite sure that Mr. Wright would like all the time he can to look at these papers that we have swamped him with, and I don't think that is an unfair statement, do you?

Mr. Wright: No, sir.

Mr. Ewing: So if I might make such a motion, I will.

Mr. Wright: Before we get into that, I had understood that counsel were going to give us some statement—

Mr. Ewing: (Interposing.) I thought I would talk to you about that now off the record.

Trial Examiner Norwood: Is it your idea to adjourn now and reconvene tomorrow morning?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will adjourn at this time and reconvene at 10:00 o'clock tomorrow morning.

(Whereupon, at 3:50 p. m., the hearing in the above-entitled matter was adjourned to reconvene at 10:00 a. m., April 25, 1947.)

2340

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
April 25, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington D. C.), appearing for Sherwin Williams Company.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2340-A E. Z. Du Bose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

Roger Hinds, Union Commerce Building, Cleveland, Ohio, appearing for The Glidden Company.

2341 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now convened at 10 o'clock a. m. on the 25th day of April, 1947 in room 605 of the Bar Association Building, 38 West 44th Street, New York City. The appearances are as follows:

J. T. Welch, appearing for the Sherwin Williams Company.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing and E. Z. Du Bose, appearing for the National Lead Company.

Proceed.

FELIX E. WORMSER, a witness called by the Respondent having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Ewing.

Q. Mr. Wormser, you have already testified this week and identified the minutes of meetings of the Code Authority which took place on the 27th of July, 1934, the 25th of September 1934, the 16th of November, 1934, and
2342 the informal meeting of June 11, 1935.

Mr. Du Bose: Which are respectively Respondent's Exhibits 6-A to I, 9-A to F, 11-A to G and 13-A to D in evidence.

By Mr. Ewing:

Q. I now hand you herewith the minute book and direct your attention to the minutes of the first, second, fourth, sixth eight, ninth and tenth meetings and ask you to check against them the photostats which I also hand you (handing same to witnesss).

A. I have done so.

Mr. Ewing: I ask that the photostats be marked for identification as Respondent's Exhibits 127-A to 133-Z-7 inclusive.

Trial Examiner Norwood: They will be so marked for identification as Respondent's Exhibits 127-A through 133-Z-7.

(The documents referred to were marked Respondent's Exhibits 127-A, 127-B, 127-C, 127-D, 127-E, 127-F, 127-G; 128-A, 128-B, 128-C, 128-D, 128-E; 129-A, 129-B, 129-C, 129-D, 129-E, 129-F, 129-G, 129-H; 130-A, 130-B, 130-C, 130-D, 130-E, 130-F, 130-G, 130-H; 131-A, 131-B, 131-C, 131-D, 131-E, 131-F, 31-G; 132-A, 132-B, 132-C, 132-D, 132-E, 132-F, 132-G, 132-H, 132-I, 132-J, 132-K, 132-L, 132-M, 132-N, 132-O, 132-P, 132-Q, 132-R, 132-S, 132-T;
2343 133-A, 133-B, 133-C, 133-D, 133-E, 133-F. 133-G, 133-H, 133-I, 133-J, 133-K, 133-L, 133-M, 133-N, 133-O, 133-P, 133-Q, 133-R, 133-S, 133-T, 133-U, 133-V, 133-W, 133-X, 133-Y, 133-Z, 133-Z-1, 133-Z-2, 133-Z-3, 133-Z-4, 133-Z-5, 133-Z-6, 133-Z-7, for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I now offer Respondent's Exhibits 127-A to 133-Z-7 for identification, in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object, your Honor, on the same grounds that I made yesterday. They contain much that is hearsay and they are self-serving. And practically all of the exhibits are irrelevant and immaterial.

Mr. Ewing: Our position, of course, is the same as we have stated before.

Trial Examiner Norwood: What minutes are these?

Mr. Ewing: These are the balance of the minutes of the Code Authority with the exception that I will mention and which I will supply.

Mr. Wright: Furthermore, your Honor, some of the exhibits are obviously incomplete in that exhibits referred to in the main parts of the minutes which are not—

Mr. Ewing: One is and that is what we are going to complete.

Trial Examiner Norwood: You will complete that 2344 on another number later on?

Mr. Ewing: Right away. They skipped photostating it for some reason.

Trial Examiner Norwood: It may be included in our numbering here and you will supply it before we leave today.

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I shall overrule the objection. I am allowing it so far as the hearsay is contained in the same manner that the other exhibits were conditioned. With that understanding, we will receive Respondent's Exhibits 127-A to 133-Z-7, inclusive.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 127-A, 127-B, 127-C, 127-D, 127-E, 127-F, 127-G; 128-A, 128-B, 128-C, 128-D, 128-E; 129-A, 129-B, 129-C, 129-D, 129-E, 129-F, 129-G, 129-H; 130-A, 130-B, 130-C, 130-D, 130-E, 130-F, 130-G, 130-H; 131-A, 131-B, 131-C, 131-D, 131-E, 131-F, 131-G; 132-A, 132-B, 132-C, 132-D, 132-E, 132-F, 132-G, 132-H, 132-I, 132-J, 132-K, 132-L, 132-M, 132-N, 132-O, 132-P, 132-Q, 132-R, 132-S, 132-T; 133-A, 133-B, 133-C, 133-D, 133-E, 133-F, 133-G, 133-H, 133-I, 133-J, 133-K, 133-L, 133-M, 133-N, 133-O, 133-P, 133-Q, 133-R, 133-S, 133-T, 133-U, 133-V, 133-W, 133-X, 133-Y, 133-Z, 133-Z-1, 133-Z-2,
2345 133-Z-3, 133-Z-4, 133-Z-5, 133-Z-6, 133-Z-7 for identification were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I show you your minute book again and direct your attention to the minutes of the fourth meeting of August 20, 1934 (handing same to witness). I ask you whether you acted as secretary at that meeting?

A. I did.

Q. Now, following the minutes proper, there are a number of papers with exhibit headings.

A. Yes, sir.

Q. And these have been marked Respondent's Exhibits 129-I to X for identification. I ask you whether those documents were filed with the Code Authority, the fourth meeting minutes?

A. They were.

Mr. Ewing: I offer them in evidence and request permission to substitute photostats.

Mr. Wright: May I see them?

Mr. Ewing: Certainly.

Trial Examiner Norwood: Those are the missing exhibits that were mentioned a while ago in connection with Exhibit 129?

Mr. Ewing: Yes, your Honor.

2346 Mr. Wright: The same objection applies to these, but since the original exhibits have been received in

evidence, I see no reason to object for that would make it incomplete.

Trial Examiner Norwood: Objection overruled. They will be received in evidence as Respondent's Exhibits 129-I to X.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 129-I, 129-J, 129-K, 129-L, 129-M, 129-N, 129-O, 129-P, 129-Q, 129-R, 129-S, 129-T, 129-U, 129-V, 129-W, 129-X, were received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Wormser, I show you the minute book entitled "Minutes of Divisions," and ask you whether therein contained you find the minutes of meetings of the lead pigments division of the Lead Industries Association (handing same to witness)?

A. Yes, sir.

Mr. Ewing: I ask that the minutes of the meeting of July 19, 1933, be marked Respondent's Exhibit 134-A to -E inclusive, and that the minutes of the meeting of the dry products committee of the lead pigments division of August 9, 1933, be marked Respondent's Exhibit 135-A and -B, and that the minutes of the dry products
2347 committee of the lead pigments division of December 6, 1933, be marked Respondent's Exhibit 136-A and -B for identification.

Trial Examiner Norwood: They will be so marked.

(The documents referred to were marked Respondent's Exhibits 134-A, 134-B, 134-C, 134-D, 134-E; 135-A, 135-B; 136-A, 136-B, for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: Mark the minutes of the meeting of the lead oxide committee of the lead pigments division, December 14-15, 1933 as Respondent's Exhibit 137-A and B for identification, and the minutes of the lead oxide committee, lead pigments division of December 27-28, 1933, should be marked Respondent's Exhibit 138-A and B for identification. That is with Exhibit "A" annexed thereto. Mark the minutes of the lead pigments division of the meeting of June 5, 1934, Respondent's Exhibit 139 for identification.

Trial Examiner Norwood: They will be so marked as Respondent's Exhibits 137-A to 139 for identification.

(The documents referred to were marked Respondent's Exhibits 137-A, 137-B, 138-A, 138-B, 139, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you your minute book containing the 2348 minutes of the lead pigments division and its committees, and ask you to note as you go through the minutes those which have just been marked as Respondent's Exhibits for identification 134-A to 139. When you come to any meeting which has not been so marked, see if you find a photostatic copy of that meeting in this bunch of photostats and thereby determine all of the minutes are either in evidence or have been marked for identification (handing same to witness).

A. It is complete.

Q. State whether the documents which have been marked as Respondent's Exhibits 134-A to 139 inclusive are minutes of the lead pigments division meetings of its committees.

A. Yes, sir.

Mr. Ewing: I offer Respondent's Exhibits 134-A to 139 for identification in evidence subject to the same condition with which your Honor has received the other similar documents.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Providing these minutes are received under the same restrictions as the previous ones, I have no objection. I believe that these minutes are more closely related to the matters in issue than those which have been previously offered as Respondent's Exhibits.

Trial Examiner Norwood: They are offered subject to that condition. They will be received in evidence as 2349 Respondent's Exhibits 134-A to 139 inclusive.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS 134-A, 134-B, 134-C, 134-D, 134-E; 135-A, 135-B; 136-A, 136-B; 137-A, 137-B; 138-A, 138-B; 139 for identification, were received in evidence.)

Mr. Ewing: I take it that we may substitute photostatic copies for the originals?

Mr. Wright: I have no objection to that procedure.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, in connection with the minutes of the Code Authority which have been received this morning as Respondent's Exhibits 127-A to 133-Z-7, will you state, Mr. Wormser, in what connection the discussions at those meetings took place and in what connection the action taken by the Code Authority at those meetings took place, generally?

A. The minutes of the Code Authority meetings reported the progress in drafting a code for the—I would like to just change that if I may.

Mr. Wright: Your Honor, I object to an answer to that question which states what the minutes report. The minutes on their face show what they report. Unless this can be added to from the witness' own knowledge—

Trial Examiner Norwood: Yes.

Mr. Ewing: I didn't mean him to paraphrase the
2350 contents. I was asking him, rather, in what connection or for what purpose these discussions took place and action was taken.

Trial Examiner Norwood: I will overrule the objection and ask him to answer it from that standpoint.

The Witness: These minutes were taken to cover the transactions of the Code Authority which had the responsibility of administering the code of fair competition for the lead industry.

By Mr. Ewing:

Q. Now, with respect to Respondent's Exhibits 134-A to 139 inclusive, representing minutes of meetings of the lead pigments division or its committees from July 1933 to and including June 5, 1934, will you state in what connection the subjects shown as being discussed by those minutes were discussed?

A. They were all discussed to draft a supplemental code of fair competition for the lead pigments division.

Q. And in what connection were the actions taken by those committees at their meetings during the same period, in evidence as Respondent's Exhibits 134-A to 139 inclusive, taken?

A. Did you say in what connection, Mr. Ewing?

Q. In what connection the actions taken by those committees—

A. They were all actions taken in connection with

2351 the code of fair competition for the lead industry plus the supplemental code of fair competition for the pigments division.

Mr. Ewing: I now offer in evidence—before I do that, Mr. Reporter, mark this for identification as Respondent's Exhibit 140.

Trial Examiner Norwood: It will be so marked.

(The document referred to was marked Respondent's Exhibit 140 for identification.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I offer in evidence page 4 of a pamphlet issued by the United States Department of Commerce, Census of Manufacturers in 1931, which is Respondent's Exhibit 140 for identification.

Mr. Wright: I would like to ask counsel the purpose for which that document is being offered. It doesn't appear to be relevant on its face.

Mr. Ewing: I am offering it to show the statistics as set forth with regard to the paint industry as a whole, showing the relative amount in this particular year of various forms of paint. The minutes of the executive committee which have been received show that the white lead use was decreasing and this shows the Department of Commerce figures in this particular year or years, I should say.

Trial Examiner Norwood: Is there any objection?

2352 Mr. Wright: I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 140.

(The document referred to, heretofore marked RESPONDENT'S EXHIBIT 140 for identification, was received in evidence.)

Mr. Ewing: Again we would like to substitute a photostatic copy of that.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection.

Trial Examiner Norwood: All right, then. Proceed.

By Mr. Ewing:

Q. I show you, Mr. Wormser, the constitution and bylaws of the Lead Industries Association revised as of January 19, 1934, and ask you to read to yourself Article 2 thereof (handing same to witness).

A. I have read it.

Q. Did the Lead Industries Association collect and publish statistical information relating to the production,

distribution, marketing, consumption and use of lead and lead products?

A. Yes, sir.

Q. And did the association disseminate accurate information regarding lead products and how they may best be used?

A. Yes, sir.

2353 Q. Did it develop methods for the improvement of the welfare of those engaged in the lead industry or in the use of its product?

A Yes, sir.

Q. Was it operated so as in general to promote the serviceability of the lead industry to the community at large?

A. Yes, sir,

Q. Now, I direct your attention to Article 3 of the constitution and ask you to read it to yourself.

A. I have read it.

Q. As far as you know, did the Lead Industries Association permit any agreement, understanding, combination or arrangement or any other form of concerted action to curtail production except as such action may have been taken during the NRA days?

Mr. Wright: Read the question, please.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"As far as you know, did the Lead Industries Association permit any agreement, understanding, combination or arrangement or any other form of concerted action to curtail production except as such action may have been taken during the NRA days?")

Trial Examiner Norwood: Answer the question.

The Witness: It never did.

2354 By Mr. Ewing:

Q. Did the Lead Industries Association, as far as you know, permit any agreement, understanding, combination or arrangement or any other form of concerted action to fix prices except as such action might have been taken during NRA days?

A. It never did.

Q. I ask you the same question with respect to the suppression of competition.

A. My answer is the same, it never did.

Q. I ask you the same question in connection with any attempt to restrain trade or commerce.

A. It never did anything of that description.

Q. I ask you the same question with respect to monopolization or attempts at monopolization.

A. It never did anything of that characterization.

Q. Will you state whether the objectives of the association as set forth in the constitution have, as far as you know, been followed by the association since its inception?

A. They have been religiously followed by the association ever since its inception.

Q. In your capacity as secretary of the Lead Industries Association having the duty under the by-laws of representing the executive committee as an administrative official, what action, if any, would you have taken had
2355 your attention been called to any attempt upon the part of any line of the lead industry to fix and control prices?

A. I would have opposed it personally. I would have reported it to the executive committee. I would have called the attention to any party attempting that to Article 3 of our constitution which strictly forbids any such activity.

Q. I ask you the same question with respect to the curtailment of production with a view to attempted monopoly.

A. My answer is the same, I would have opposed it personally as against my own scruples and I would have reported it to the executive committee. As a matter of fact, I think I would have resigned from the association if anything like that had been attempted.

Q. I should have, in asking you, excluded from the question anything done during the NRA days.

A. Yes, sir; that is a reservation that I would also like to reserve to modify my statement to the extent that even in NRA days my executive committee was of the same mind. They wanted open competition and they have always had that stand. I personally have had that strong feeling.

Q. I ask you the same question with respect to the adoption of uniform terms and conditions of sale with the same qualification in regard to the NRA days.

A. My answer is the same on that; we would have resisted it.

2356 Q. Can you state of your own knowledge the atti-

tude of the miners, smelters and refiners in the lead industry, with respect to any effort on the part of their consuming customers of lead products to secure a monopoly in any particular line of the business?

A. It would have meant—

Q. Just yes or no. Can you state of your own knowledge the attitude?

A. Yes, sir.

Q. Please state their attitude.

A. They would have raised violent objections to it for the obvious reason that they are dependent upon as broad a market as possible for the sale of their own production.

Mr. Wright: Your Honor, I move that that answer be stricken as so vague and indefinite as not to have any value.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the question and answer as follows:

Q. "Please state their attitude."

A. "They would have raised violent objections to it for the obvious reason that they are dependent upon as broad a market as possible for the sale of their own production.")

2357 Trial Examiner Norwood: I don't think—

Mr. Ewing: He answered the first question by saying that he could state of his own knowledge.

Mr. Wright: This answer wasn't a statement.

Trial Examiner Norwood: He can give us the facts relating to this policy or their actions and everything, but that is merely just speculation. I am going to allow the motion to strike that answer.

Mr. DuBose: Exception.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Were there a monopoly in the white lead or lead pigments industry, what would be the effect thereof on the lead outlets of the miners, smelters and refiners?

A. It would diminish the outlets for the lead miners, smelters and refiners.

Q. What, if you know, of your own knowledge, would be the attitude of miners, smelters and refiners in the lead industry with respect to a diminishing of their outlets?

Trial Examiner Norwood: I don't think that he can say what it would be.

Mr. Wright: I am not objecting to the question, but I am going to object to any answer which isn't based on evidentiary facts, however. I don't think that question could be answered by some broad general conclusion
2358 with the use of the word in such broad terms as "they."

Trial Examiner Norwood: Now, I will have to let it go by, but I am interested in maintaining a little consistency here.

Mr. Wright: Well, your Honor, then I will object to the question as calling for a broad conclusion.

Trial Examiner Norwood: I will sustain the objection.

By Mr. Ewing:

Q. What was the attitude of the lead miners, smelters and refiners in the lead industry with respect to any attempt to restrain trade on the part of their customers?

Mr. Wright: Objection.

Mr. Ewing: That is calling for a fact, what was their attitude, if he knows, of course.

Trial Examiner Norwood: I think that is a conclusion. He can state what they did or what they said that would indicate to him what their attitude was. After all, you are using the word "attitude" in the sense of their opinion, and I don't see how he can tell us what the other fellow thought.

Mr. DuBose: If he knows of his own knowledge.

Trial Examiner Norwood: How could he know of his own knowledge?

Mr. DuBose: If he knows of his own knowledge.
2359 These questions are predicated upon that. It is a question of fact.

Trial Examiner Norwood: I will sustain the objection. He can say as to what the policy of his association is as he knows it, and tell us why he knows it and give us any facts with regard to what their attitude would be.

By Mr. Ewing:

Q. What was the policy in your association of the miners, smelters and refiners in regard to practices in restraint of trade?

Mr. Wright: I object, your Honor. This question also calls for a broad general conclusion. I think that this subject is one that we can get to by getting at the evidentiary facts. I think it is susceptible of being proved in that way

and since it can be proved in that way, one way or another, I don't think it should be proved by these broad general sweeping questions.

Trial Examiner Norwood: As secretary of this association—

Mr. Wright: He has already testified as to what the policy of the association was and I didn't object to those questions.

Trial Examiner Norwood: They are controlled all the time by their policy.

2360 Mr. Wright: This question goes to the attitude of individual smelters and miners and refiners and processors of lead.

Mr. Hinds: If your Honor please—

Trial Examiner Norwood: They are members of his association?

Mr. Ewing: That's right.

Mr. Hinds: If your Honor please, having in mind that this involves a charge of a conspiracy and that we are before an administrative tribunal, it occurs to me that even if this question should be the subject of some technical consideration, a little more latitude should be given to the people charged with conspiracy and the Court will not be properly influenced that is not evidentiary that has some probative value. But I bespeak a more broad view on the rules of evidence than is applied by our apponent's objection here.

Trial Examiner Norwood: Now, I think these matters come inside of the realm of opinion evidence, and I think we will have to confine this to the expressed policy of this organization.

Mr. Ewing: I confined this question following one of your suggestions, in part, to the expressed attitude of a certain portion of the membership of this association, and I submit that that is perfectly proper.

2361 Mr. Wright: I call your attention, your Honor, that this question goes to the attitude of individual companies and individual members, not to the collective attitude and policies of the association. That has already been testified to and I made no objections to this witness' testifying as to the policy of the association. But now we are getting into another realm which is the realm of the individual policies of a number of members who are all listed here and whose attitude, if it were pertinent to this issue, could certainly be proven—

Mr. Ewing: As expressed in their meetings which directed Mr. Wormser, in operating the association—

Trial Examiner Norwood: I was not sufficiently specific in my remarks a while ago. I didn't use the word "expressed," but counsel have clarified the thing in the discussion, and you must confine it to the expressed policy. I will allow that and overrule the objection with that understanding.

Mr. Wright: Do I understand, your Honor, that the policy as expressed in their activities to the Lead Industries Association—

Trial Examiner Norwood: Yes, expressed to him any time. He can tell what their policies are, if he knows.

Mr. Ewing: That is what my question asked for.

Trial Examiner Norwood: But he must base it on
2362 facts and not mere conclusions.

Mr. Ewing: I have forgotten my question actually, but my question was intended to call for a statement by Mr. Wormser, if he knows if there was any such thing showing the expressed attitude or position taken by miners, smelters and refiners in the Lead Industries Association with respect to the practices of any kind in restraint of trade.

Trial Examiner Norwood: If you will put in these expressions themselves and the factual matters on which he bases that, I think it would be more satisfactory to everybody including yourself.

Mr. DuBose: We have various expressions in the executive committee minutes and in the directors' minutes and this question would be in part based upon those.

Trial Examiner Norwood: I will permit him to answer this question but please don't take it as a precedent.

Mr. Wright: Exception.

Trial Examiner Norwood: Answer the question.

The Witness: May I have the question read?

By Mr. Ewing:

Q. I will rephrase the question and see if I can bring it within the confines.

Will you state the attitude of miners, smelters and
2363 refiners, members of the Lead Industries Association as expressed to you or in your presence with respect to any practices in restraint of trade?

Mr. Wright: The same objection, your Honor.

Trial Examiner Norwood: Overruled.

The Witness: Your Honor, may I go a little bit into the history of the association to answer that question?

Trial Examiner Norwood: Certainly.

The Witness: Well, from its very inception, being an organization comprised of lead mining, smelting, refining and manufacturing companies, the principle was always put to me that we must expand our markets to develop the national resources of the United States in lead to the utmost. It is quite obvious, therefore, that if the lead miners were to subscribe to any monopolistic practice of any of the consumers represented in their association, their own feelings, their own principles, would be distinctly violated and the association would disintegrate. By the same token, the manufacturers have a distinct interest in seeing that the price of lead is kept at as low a value as possible so as to keep their competitive position strong. And they would naturally be adverse to seeing any monopolistic practice among the miners or the smelters and refiners. And that very setup that we have had from the very start makes me walk a chalk line. The association cannot
2364 possibly engage in any monopolistic activity on any side of the fence without disintegrating.

Mr. Wright: I move to strike the answer as not responsive. It is the witness' own conclusion as to what the attitude of the members might have been.

Mr. Ewing: I would like to ask him one more question before your Honor rules.

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Does what you have just stated, Mr. Wormser, represent actual expressions of the views of the miners, smelters and refiners made to you from time to time?

Mr. Wright: I object, your Honor. The witness has just stated that those are his own opinions.

Trial Examiner Norwood: I think that the previous answer was pure argument.

Mr. Wright: It was an expression by the witness himself.

Trial Examiner Norwood: Yes. I will allow the motion to strike it.

Mr. Ewing: May I have the question read to Mr. Wormser again and see if he can respond to it?

Trial Examiner Norwood: Yes. If you can answer that in a factual way, do so. Let the Commission's counsel and the rest of us try to put these facts together and see
2365 the reasons on it. We are asking you to give the facts on which we can base our reasons. Read the question.

(The reporter read the question as follows:

Q. "Does what you have just stated, Mr. Wormser, represent actual expressions of the views of the miners, smelters and refiners made to you from time to time?")

The Witness: I don't know whether the factual statement I recently made before the Committee on Public Lands of the House might serve your purpose, your Honor, but in that I clearly stated that our association wants free, fair and open competition, or words to that effect. And I think that expresses the policy of the association.

Mr. Wright: I move to strike it as not responsive. Again it is a statement of the witness' own opinion as to what the association stands for and the policy of the association. The question went to what the individual members—

Trial Examiner Norwood: Motion denied. Go ahead.

By Mr. Ewing:

Q. Mr. Wormser, is the development of effieiency in production and distribution through technical research, technical advisory service, market and merchandising research, an objective of the Lead Industries Association?

Mr. Wright: I object.

2366 Trial Examiner Norwood: Sustained.

Mr. DuBose: Upon what ground, your Honor?

Trial Examiner Norwood: It is leading.

Mr. Wright: Presumably this witness knows what the objective of the Lead Industries Association are. I don't want the record to show him either ratifying or failing to ratify Respondent's statements.

By Mr. Ewing:

Q. What, in your opinion, was the principal objective of the Lead Industries Association?

A. The principal objective of the association was to promote a wider use of lead in all its forms throughout the United States.

Mr. Ewing: That concludes our cross examination.

Trial Examiner Norwood: Cross examine.

Mr. Wright: First of all, I want to make inquiry of

counsel. Was Mr. Wormser called as a witness of the Respondent's as a whole or was he called as a witness of the National Lead Company?

Mr. Ewing: I don't know what the answer to that is. I called Mr. Wormser. Certainly he was called as my witness and I would take it that the evidence that he gives to the extent that it is in the record is binding on everybody.

Trial Examiner Norwood: Yes. That is binding as
2367 it may be connected by the whole record.

Mr. Ewing: That's right.

Mr. DuBose: As it may be connected against the other Respondents.

Mr. Ewing: For or against, or however it is.

Trial Examiner Norwood: He is the witness for the association to which all the Respondents belong.

Mr. Ewing: Well, that is not quite true because the association isn't a party here and neither is Mr. Wormser. And while we are represented in the association, there are as you know a great many others represented in the association, too. So that he is not here testifying for the association. He is here testifying as to the facts that he has known with respect to the association and what the association did except where he testified as an expert.

Trial Examiner Norwood: I think it is clear now. We will have a five-minute recess at this time.

(Whereupon, a five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Cross-Examination by Mr. Wright.

Q. Mr. Wormser, will you state again for me the various divisions and sub-organizations of the Lead Industries Association?

2368 A. Yes, sir. We have a mining division, a smelting and refining division, a lead pigment division and a metallic lead products division.

Q. And then you have the executive committee and the Board of Directors?

A. Yes, sir.

Q. Now, these exhibits that we have received comprise all of the minutes, do they not, of the executive committee, the Board of Directors and the pigments division?

A. Yes, sir.

Q. What sub-divisions are there under the pigments di-

vision or other sub-organizations which would have anything to do with lead pigments?

A. Well, under the pigments division we had a white lead in oil section, if you will, and then—

Q. Those minutes of the white lead in oil section are all in; is that right?

A. Yes, sir; and also the dry products section which would cover dry white lead and the lead oxides.

Q. Well, now, on these minutes which have been received this morning, Respondent's Exhibits 135 and 136 and their sub-numbers, they were the dry products division, as I recall it?

Mr. DuBose: Not all of them, I don't think.

2369 By Mr. Wright:

Q. These two particular ones, whereas Exhibit 137 and 138 were the lead oxides.

A. I will have to refresh my memory on that.

Q. Yes. I am referring now to the meeting of July 19th. It was received as Respondent's Exhibit 135-A and B.

Mr. DuBose: Exhibit 134, I think it is.

By Mr. Wright:

Q. I am talking about July 9th. Excuse me, August 9th. August 9th and September 6th, those were the dry products sections?

A. August 6th was dry products—

Mr. DuBose: August 9th.

The Witness: August 9th was dry products but September 6th was white lead in oil. There were two for September 6th. There was also a dry products meeting on September 6th.

By Mr. Wright:

Q. Will you refer to the meeting on December 14th and 15th, 1933, which is in evidence as Respondent's Exhibit 137-A and B?

A. Yes, sir.

Q. What sub-divisions were those meetings?

A. That was the lead oxide committee of the lead pigments division.

2370 Q. Well, now; is that a sub-division of the dry products section?

A. Yes, sir; because we had dry white lead and dry oxides which had different problems.

Q. Well, now, the dry products committee then handled dry white lead; is that correct?

A. And also the dry oxides.

Q. And also the dry oxides?

A. Yes, sir.

Q. But there was a separate sub-division for dry oxides?

A. Yes, sir.

Q. And for dry white lead?

A. Yes, sir.

Q. All of the minutes of the meetings of those various sub-divisions are all in evidence?

A. Yes.

Q. Were there any other organizations in the period of time from the beginning of the Lead Industries Association to the present, which had anything to do with lead pigments?

A. When you say, "had anything to do," sir, I don't know whether you mean—for example, there was a paint industry and, of course, they have something to do. There is the National Paint, Varnish and Lacquer Association.

Q. I am talking about in the Lead Industries Association.

2371 A. I see what you mean, no, sir.

Q. Was there a red lead committee?

A. I would have to refresh my memory because we had red lead and litharge as part of the oxide activities of the association. And, of course, the litharge problems were different from the red lead problems. So I believe we set up both a red lead committee covering paint, and litharge for, say, storage batteries which was the largest outlet for litharge.

Q. Well, now, would the lead oxides committee cover the red lead activities of the association?

Mr. DuBose: What period are you talking about?

Mr. Wright: I am talking now about the period back in 1933 and 1934.

Mr. DuBose: You are referring to the code period then?

Mr. Wright: To the code period, but I want to bring it up to day.

The Witness: They were all, Mr. Wright, under the Lead Oxide activities of the association.

By Mr. Wright:

Q. Was there any separate organization dealing with red lead or litharge which met in that day?

A. No, sir.

Q. Has there been since any organization?

2372 A. We have a red lead technical committee but that has no bearing on this matter at all.

Q. What was the function of that red lead technical committee?

A. That red lead technical committee is a committee composed of laboratory technicians designed to improve the formulation of red lead in metal protective paints.

Q. Has the Lead Industries Association had any red lead program as such?

A. When you say a "red lead program," do you mean a promotional program?

Q. Any sort of a program known as a red lead program.

A. During code days, or are you referring to any time in our history?

Q. No, sir. I am referring to any time in your history.

A. Yes, sir. We have a program under way right now which is designed to promote the use of red lead in paint.

Q. What is that program known as, or how is it carried on your records?

A. It is our red lead research program.

Q. How does that differ from your red lead technical committee? Are those activities combined?

A. It is the same; it is synonymous.

Q. When was that program initiated?

A. During the war. I would say 1943, without re-

2373 freshing my memory, but I think that is about the time. It was designed to strengthen our competitive position against competitive materials made out of zinc chromate and aluminum and iron oxide and other competitive products.

Q. I direct your attention to a document which has heretofore been marked as Respondent's Exhibit 102-I, which purports to be a financial statement for the red lead division, 1943.

A. Yes, sir.

Q. Will you state what that red lead division was?

A. That is again the technical program in which our red lead division, with the assistance of the lead mining companies, has engaged in for this period January 1st to November 30th.

Q. When was that red lead division represented by that financial statement, started?

A. If I could refresh my memory on my annual report

—it is distinctly in the reports. I would say offhand, Mr. Wright, without it being held against me, that it must be 1943 or possibly 1942. It was during the war. It was no earlier than the war, I will put it that way, perhaps no earlier than 1942.

Q. Now, I understood your testimony, Mr. Wormser, to be that you were thoroughly conversant and familiar with the business of the various concerns listed in Com-
2374 mission's Exhibit 498, 499 about which you testified earlier in the week, namely, a list of members of the Lead Industries Association at various times and the directors and officers of the Lead Industries Association.

A. Did I say thoroughly conversant?

Q. That was my understanding of your testimony.

Mr. DuBose: He was just asked to identify them, Mr. Wright.

By Mr. Wright:

Q. As I recall your testimony, you identified them as members and also stated what their principal business was.

A. I correct that.

Q. And you also stated as to where a number of their plants were located.

A. Yes, sir.

Q. Now, I call your attention to 498-A, the evidence shows the Evans Lead Company of Charleston, West Virginia.

A. Yes, sir.

Q. What was the principal business of that company?

A. The manufacture of lead oxides.

Q. Where was that plant?

A. In Charleston, West Virginia.

Q. Do you know what the production in that plant was in that period, say, in 1933 and 1934?

A. I don't recall, Mr. Wright.

2375 Q. I notice that the Evans Lead Company is still carried as a member of the Lead Industries Association; is it not?

A. Evans Lead Division.

Q. I call your attention to the Evans Lead Division, National Lead Company, in Commission's Exhibit 498-Z. When did the change in that member's status occur?

Mr. DuBose: Mr. Wright, that is already in evidence. Last year Mr. Merson testified with respect to that. I don't

see the purpose of this cross-examination. I object to the question.

Trial Examiner Norwood: Wait a minute, let him go ahead.

Mr. DuBose: I object to the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows: "Q. I call your attention to the Evans Lead Division, National Lead Company, in Commission's Exhibit 498-Z. When did the change in that member's status occur?")

Trial Examiner Norwood: Objection overruled. Answer that, if you know it.

The Witness: From our records it appears that it occurred in 1944.

By Mr. Wright:

Q. Do you know when the National Lead Company 2376 acquired the Evans Lead Company?

A. I don't recall.

Q. I call your attention to the Andrews Lead Company, Inc., of Long Island City, New York, on Commission's Exhibit 498-F and I see it does not appear on Commission's Exhibit 498-H. What happened to that company; can you tell us?

A. I think the Andrews Lead Company was absorbed by the American Smelting and Refining Company.

Q. What was the business of the Andrews Lead Company?

A. The Andrews Lead Company made metallic lead products and also some lead oxides.

Q. I call your attention in Commission's Exhibit 498-D, to Wetherill and Brother, Philadelphia, Pennsylvania. What was the business of that concern?

A. Manufacturers of white lead.

Q. Did they manufacture white lead in oil or dry white lead or both?

A. I believe they manufactured both.

Q. I call your attention to the subsequent list of members of the Lead Industries Association on which Wetherill and Brother does not appear. What happened to that company, do you know?

A. I think it was taken over by the National Lead Company.

Q. Do you know about when it was taken over?

2377 A. I would have to refresh my memory through a search of the records, Mr. Wright. I don't recall the exact year. It is quite a few years ago. There is not enough data here for me to indicate what it was.

Q. Mr. Wormser, in the past few days you testified as to a good many statements of facts regarding these meetings of the various divisions of the Lead Industries Association during the period 1933 and 1934. Just how clear is your recollection of those meetings?

A. None too clear, I am frank to confess, Mr. Wright, but clear enough to get a pretty good idea of what transpired during that period.

Q. Can you recall any specific conversations as to these meetings? Has your recollection been sufficiently refreshed by reading these minutes to picture those minutes and to have independent recollection of who was there and what went on?

A. I can't answer yes to that, Mr. Wright.

Q. In other words, the answer would be no?

A. Well, I have certain episodes that stand out vividly in my memory and also will stand out and others that are very vague indeed.

Q. Well, now, as to specific meetings that occurred back in that time, could you, without consulting the minutes, tell where they were held and who was there and the
2378 subjects that were discussed?

A. No, sir; I could not.

Q. In other words, most of your information comes from reading the minutes; is that correct?

A. Yes, sir.

Q. And not from any independent recollection of what occurred?

A. Oh, vague as it may be, I have recollections of what went on refreshed by a perusal of the minutes.

Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, we have run practically four days here and received a mass of documents, quite a good many of which I would like to examine with respect to this witness, and I respectfully request that the cross examination be deferred until May 7th and 8th in Washington, I believe was the time suggested by the counsel, and it would be convenient to them and the witnesses.

Mr. Ewing: That is quite satisfactory subject to the acts of God and so forth.

Trial Examiner Norwood: It is out tentative plans, then, to go ahead with the reception of further evidence with the Respondents beginning in Washington on
2379 the 13th of May.

Mr. Ewing: That's correct.

Trial Examiner Norwood: And that we will make plans at that time for future activities. The motion is allowed and by agreement of counsel we will now adjourn to reconvene in Washington, D. C. in Room 332, Office of the Federal Trade Commission at 10 o'clock a.m., whatever time is prevailing in the City, on the 7th day of May.

It is understood that the witness is now excused and directed to appear in Washington to give further testimony.

(Witness excused.)

(Whereupon, at 2:10 o'clock p.m., the hearing was adjourned to May 7, 1947 at 10 o'clock, a.m. in Washington, D. C.)

2380

Room 532, Federal Trade Commission Building, Washington, D. C., Wednesday, May 7, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, 1649 Union Commercial Building, Cleveland 14, Ohio, appearing for the Glidden Company.

2381 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment in New York on the 25th of April, the hearing in Docket 5253 is now convened in Room 532 of the Federal Trade Commission Building, Washington, D. C., at ten o'clock a.m., on the 7th day of May, 1947.

The appearances are as follows:

Joseph S. Wright, appearing for the Federal Trade Commission.

Edmund P. Wood, appearing for Eagle Picher Lead Company and Eagle Picher Sales Company.

Robert H. Ecker, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing and E. Z. DuBose, appearing for the National Lead Company.

John A. Duncan, appearing for the Glidden Company.

Mr. Felix E. Wormser will resume the stand for cross-examination.

Mr. Duncan: If your Honor please, may I say, on behalf of the Glidden Company and the other respondents, we are making an application to the Examiner at this time to change the schedule for the May 13 hearing which was to begin in Washington, so that it will begin in Cleveland rather than Washington, for this reason:

The testimony to be offered at the May 13 hearing
2382 will be testimony, I believe, on behalf of the Glidden Company, and it really would be a great accommodation to those witnesses if the hearings were to be held in Cleveland rather than in Washington, starting May 13th. I realize that today, being the 7th of May, this is pretty short notice to counsel representing the Federal Trade Commission and to you, but I do feel that in as much as your Honor came to Cleveland when the government was putting on its case that, in the circumstances, if May 13 is too short a notice, I suggest then that the date be put off say until the following week, say May 20, in order to accommodate the witnesses who will testify on behalf of Glidden.

I realize that this is a discretionary matter on the part of the Examiner, but I do feel that in the circumstances it would be a great accommodation to the witnesses.

Trial Examiner Norwood: How many witnesses do you have there?

Mr. Duncan: I don't want to say exactly because I don't know at this time, but I know that there will be more than two witnesses, and I feel that, with the exhibits which have been made up, and which will be offered, and the fact that Cleveland is the home office for the Glidden Company, that, frankly, it would really be of great benefit to us if you would have the May 13 hearing in Cleveland rather than here in Washington.

Mr. Wright: I have no objection, your Honor, to
2383 that. I appreciate it would be a convenience to respondents in the matter. I also have no objection to going ahead on the 13th rather than postponing it to the 20th. As a matter of fact, I would rather have it on the 13th than the 20th, so far as my personal plans are concerned.

Trial Examiner Norwood: We have come to an understanding about this hearing and it is absolutely impossible for me to go to Cleveland on the 13th and I don't want to postpone the case any further. Inasmuch as you have only three or four witnesses it will be much less expensive to the other respondents and to the government people to have the hearing in Washington as appointed. I don't want to change our arrangements on that.

Mr. Duncan: I see.

Trial Examiner Norwood: I don't think it is necessary to go over there for two or three witnesses and to move the whole hearing over there. Now, it is different when we arranged a series of hearings outside of Washington and stopped in Cleveland a couple of days on the way to Chicago, and so on, as we did before. That is a different matter.

Mr. Duncan: Of course, I realize it is discretionary with you, but I feel—we are not trying to stall the matter.

Trial Examiner Norwood: I understand. It is a matter of your coming to Washington or our taking the lawyers and reporters, and everybody, over there to Cleveland
2384 to hear two or three witnesses.

Mr. Duncan: We have Attorney Ed Wood who comes from Cincinnati. Cleveland is nearer for him than Washington. From the standpoint of Mr. Ewing and Mr. DuBose, who come from New York, I frankly don't think it makes a particle of difference to them.

Trial Examiner Norwood: I cannot accede to counsel's request.

Mr. Duncan: Am I to understand that May 13 is the date and that you will proceed in Washington?

Trial Examiner Norwood: In Washington, D. C., unless we come to some further arrangement about it. We will talk about it off the record.

Mr. Wormser, will you resume the stand.

Proceed wit the cross examination.

FELIX E. WORMSER, a witness called by the respondents, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Wormser, you testified on direct examination regarding the location of the smelters and refiners of pig lead in the United States. You mentioned a plant at Galena, Kansas, as I recall. What is that plant at Galena?

A. That is a lead smelter owned by the Eagle
2385 Picher Company for handling the local concentrates from the tri-state and surrounding mining areas.

Q. What is the tri-state area?

A. The tri-state area is essentially a zinc producing area, comprising—comprised of the corners of three states, Missouri, Oklahoma, and Kansas, coming together. That happens to be the largest single source of zinc in the United States and they get some lead as by-product.

Q. The area falls into the corners of those three states?

A. That is correct, sir.

Q. Does the National Lead Company have any processing plant at Galena?

A. No, sir.

Q. Are any pigments produced at Galena?

A. Yes. Some sublime pigments are produced there. That is sulphates from treating the concentrates, the lead concentrates, directly in specially designed furnaces to produce a lead sulphate.

Q. That is basic lead sulphate?

A. Yes.

Q. Who produces the pigments?

A. Eagle Picher.

Q. Will you tell us how pig lead is priced in the United States?

A. Well, I think I can explain it best to you by
2386 stating that it is a world,—it is a commodity that is produced in various parts of the world.

Q. May I interrupt there? I don't think you understand what I have in mind. How are prices for pig lead at different localities in the United States calculated?

A. Well, I think even to—we have two markets in the United States, two major markets, New York and St. Louis, but then there are many other markets which reflect the principal consuming centers of pig lead, particularly along the eastern seaboard, where the greatest amount of lead in the United States is used, so that I might also say there is a market in the Philadelphia area, in Cleveland, Buffalo, dozens of points all over the United States.

Q. You say there is a market. What do you mean by that?

A. Well, I mean that there is a price of lead which represents today, for example, what it would cost to buy lead in that particular point.

Q. What is the price of lead in St. Louis today?

A. The price of lead in St. Louis today would be 14.80 cents per pound.

Q. What is the price of lead in New York?

A. Fifteen cents per pound.

Q. Then there is a 20-cent spread at the present time?

A. Yes, sir.

Q. What is the corresponding quotation in Chicago?

2387 A. I think it is 14.85 or ninety, I am not certain. It varies a bit. I say 14.80. Probably if you picked up trade papers today you would find several quotations reflecting the St. Louis market.

Q. Several quotations?

A. Yes, sir, several different quotations. I would say in Chicago it is five to ten points higher, although Chicago also has its market.

Q. Five or ten cents higher than St. Louis?

A. That is right.

Q. But below New York?

A. Yes, sir, below New York.

Q. What is the present relation between the market in Philadelphia and New York?

A. I think Philadelphia and New York are about on parity.

Q. Has that been the case over a considerable period of years?

A. For quite some time, I should say, because Philadelphia and New York, and Baltimore and Boston, and other points along the seaboard, are ports of entry for foreign lead, that is, Mexican lead, Peruvian lead, Australian lead, and other foreign lead coming into the United States.

Q. Back in the period say from 1933 to 1936, what was the relation between those ports and New York?

A. Well, I would say they were very close together, Mr. Wright. I would hate to rely on my memory to give you exact figures.

2388

Q. In that period was there any considerable amount of Peruvian or Mexican lead coming into the United States for consumption here?

A. No, in those days a comparatively moderate amount compared with the tonnage we have to import now.

Q. Was that ordinary pig lead consumed from foreign sources in those times, or was that a special variety?

A. No, sir, that was commercial pig lead, mainly from Mexico.

Q. What are the different common grades of pig lead?

A. We have a common desilverized lead which I would say would be the lead that was quoted in these markets that we are discussing.

Q. Is that the base lead?

A. Yes, that is the base lead, because the other grades generally command a premium of maybe a dollar or $2 a ton. We have a corroding grade of lead which is a very pure form of lead and does command a premium over common lead.

Q. What is that premium customarily?

A. Two dollars a ton, I would say on the average. Then we have chemical lead, which is a natural copper-bearing lead. That comes from Missouri, and is very popular where high corrosion resistance is demanded. Wherever sulfuric acid, for example, is used.

2389

Q. Does that command a premium?

A. Yes, sir, of $1 to $2 a ton. Then we have synthetic copper-bearing lead corresponding to the chemical grade and which commands a premium. Of course, we have antimonial lead, but we need not consider that, that is more or less a specialty. I would say common lead, corroding and chemical are the there great leads.

Q. On the antimonial lead, how are prices quoted?

A. That varies, Mr. Wright. I would say it depends on the market, how strong a demand there is for it. Cur-

rently, with antimony so scarce, it is difficult to obtain antimonial lead, and it commands a price reflecting the cost of the lead in the antimonial lead plus the antimony, but there have been times in the past when antimonial lead has been a drug on the market and has been sold at a price equal to lead and I believe at times even lower.

Q. What times are you referring to?

A. Well, I would say back in around the thirties, early thirties. At the time of the depression in 1931 to 1934, thereabouts.

Q. Well, was the customary way of selling antimonial lead in the period subsequent to 1934 to compute the price by taking the price of the pig lead contained in the alloy plus the price of the antimony?

A. That is the way the seller would prefer to sell 2390 it if he could get that price, but the market will often not permit him to do that and he has to sell it substantially below that.

Q. Now in the period from 1934 to 1941, what was the customary differential between New York and St. Louis on pig lead?

A. I would say it was about 15 points. $3 a ton, Mr Wright.

Q. That would mean 15 cents a hundred pounds?

A. Yes, sir. .15 cents per pound.

Q. Is there is a market in Dallas, Texas?

A. Yes, sir.

Q. What is the relation of that market to the St. Louis market?

A. Well, I can't trust my memory to that. I think I can answer in just a moment, referring to a paper, some records I have here.

Dallas, Texas, takes the New York market.

Q. What is the Atlanta, Georgia, market?

A. Atlanta, Georgia, .05 cents per pound above New York.

What is that document to which you are referring?

A. This is the official order of the Office of Price Administration issued on June 3, 1946, covering its revised price schedule 69 on primary lead.

Q. Is that order still in effect?

A. No, sir.

Q. Over what period of time was it in effect?

A. Well, this particular order is a revision of an

earlier order that was in effect on the establishment
2391 of the OPA in the early days of the war, I would say 1942 to 1946, say four years, and this order reflected an increase in price granted by the OPA raising the official ceiling from six and a half cents to eight and a quarter cents.

Q. Now, under that order, what was the differential between New York and St. Louis?

A. Fifteen points, I believe. Fifteen points.

Q. What was the differential at Chicago over St. Louis?

A. Five points.

Q. When you speak of five points, do you mean five cents per hundredweight?

A. I mean .05 cents per pound.

Q. .05 cents?

A. Yes.

Q. What was the market in Cincinnati?

A. In Cincinnati—it took the New York market.

Q. How about Scranton?

A. Scranton took the New York market.

Q. What was the market at San Francisco?

A. As I recall it was also—no. Yes, also New York.

Q. Well, then, am I correct in my understanding that St. Louis has the lowest price customarily for lead in the country?

A. Well, when you say the lowest price you mean the lowest price of the refined metal?

Q. Yes, sir.

2392 A. I think that is correct, although theoretically, sir, there are refineries in the west who might be shipping to the eastern points and if you figure their net price it would still be less than St. Louis, but for all practical purposes the St. Louis price is the lowest.

Q. What is the market price in Great Falls, Montana?

A. The market price a Black Eagle, which is close to Great Falls, that is also New York.

Q. Are there any markets in Idaho?

A. Idaho at Bradley, where the Bunker Hill Smelter is located, that also is the New York price; eight and a quarter.

Q. When they ship back to the eastern refineries their net would be considerably less—or to the eastern processors, their net would be considerably less on the refined lead than the market price at that point?

A. If they deduct this cost of delivering and consider that they sell on that market, that is true.

Q. Do you know what the freight rates are on pig lead per hundredweight from St. Louis to New York?

A. I think it is about 35 points. I am not certain of that, though, I haven't looked it up recently.

Q. Thirty-five points of a cent per pound?

A. Thirty-five one-hundredths of a cent per pound.

Q. Or 35 cents per hundredweight?

A. Yes; 35 one-hundredths. But there again I
2393 would hate to trust to my memory. I could easily verify that for you, sir, if you would like to have it.

Q. On this 15-cent differential between St. Louis and New York, was that a customary differential over a long period of time prior to the maximum price order?

A. It has been rather uniform, Mr. Wright, yes.

Q. Back to what period?

A. There again I would hate to trust to my memory, Mr. Wright. I would say at least in the late twenties.

Q. It has obtained since approximately that time?

A. That is my feeling.

Q. You mentioned in your direct testimony, I believe, either a smelter or refinery in Houston, Texas. Am I correct in my recollection of that?

A. I don't think I did, Mr. Wright. There is a secondary refinery there working on scrap lead. No primary refinery.

Q. I see.

A. There is a primary refinery at El Paso. Perhaps that is what you had in mind.

Q. Mr. Wormser, I recall that you testified on direct regarding the London market on pig lead and the American market. I call your attention to a document appearing as Respondents' Exhibit 28-D, which is part of a directors meeting of the Lead Industries Association on November 26, 1929, indicating that the Association exchanged statistics with the Lead Producers' Reporting Asso-
2394 ciation in London. Did the Associations exchange data?

A. No, sir; that was never put into effect.

Q. Were you familiar with the market in London on pig lead?

A. I was familiar with the fluctuations in the market, yes, sir, and the forces acting on the London market.

Q. Are you familiar with the quotations of prices on

the London market that appear from time to time in the Engineering and Mining Journal?

A. Yes, sir.

Q. Is that a reputable and reliable source of information on market prices for metal products?

A. It is.

Q. Do you recall the characteristics of the quotations in the period from 1933 to 1939 on—spot quotations—on the London Exchange on pig lead?

A. Mr. Wright, I don't without refreshing my memory.

Q. Mr. Wormser, I show you some photostats of some documents and ask you if those will refresh your recollection of those matters.

During the year 1936 was the London market, spot market for pig lead, one which fluctuated up and down from day to day?

A. Yes, sir.

Q. So that very seldom there would be a price which would hold for more than two or three days?

2395 A. That is correct, sir.

Q. During that same period what was the characteristic of the New York and St. Louis market on pig lead?

A. They were very steady according to these figures. In fact, it looks from the record here that in February there was a little fluctuation up and down from a 4.50 New York price to a 4.60 price, which held until September.

Q. Of 1936?

A. Yes.

Q. Without any further fluctuation?

A. Without any further fluctuations.

Q. Do I understand you to state that pig lead was sold on a highly competitive market both in the United States and on the world market?

A. Yes, sir.

Q. Is it your idea of competition that a spot quotation price on basic commodities should stay without change over a long period of time?

A. Well—

Mr. Ewing: I will object to that, if your Honor please.

Mr. Wright: On what ground?

Mr. Ewing: His "idea of competition."

Mr. Wright: Your Honor, this witness has been qualified as an expert in the marketing of all of these

2396 products and has testified about competitive condi-

tions generally and has expressed his opinion. I believe on cross-examination I should have equal latitude.

Mr. Du Bose: The form of the question is hardly asking for his opinion. It asks for his "idea."

Trial Examiner Norwood: I think that is pretty good. Overruled.

Do you want the question read?

The Witness: Yes, sir.

Trial Examiner Norwood: Read the question.

(The question was read as follows:

"Is it your idea of competition that a spot quotation price on basic commodities should stay without change over a long period of time?")

Mr. Du Bose: That is argumentative, if your Honor please.

Trial Examiner Norwood: Let him answer.

The Witness: I still think you can have a highly competitive market, even under those conditions.

By Mr. Wright:

Q. Now, wasn't the year 1936 one of general economic distress?

A. It was.

Q. Were conditions the same throughout the whole year?

A. That I wouldn't be able to answer offhand, Mr. Wright.

Q. You would consider it competition if a price be 2397 maintained without fluctuation over a period of months in time of economic distress?

A. Well, Mr. Wright, to get behind that question, if you are asking for my opinion, talking about distress, I have in mind the distress of miners in the west, who operated all sorts of properties, little properties, medium-sized properties, and so forth. With men thrown out of work, that was distress. These men wanted to get as much as they could for their lead. To ask them to go down, up and down, on a fluctuating market, would be just chaotic.

Q. That lead then was mined under many different types of operation?

A. Yes, sir.

Q. And the costs of the mining were widely different, too?

A. Very widely fluctuating.

Q. Mr. Wormser, at the hearing on April 22nd in New York, you testified according to the record at page 2153. I direct your attention to your answer that appears from line 7 through line 21 on that page. (Handing transcript to the witness.)

A. I have read it, Mr. Wright.

Q. What was the basis of your answer to the effect that the industry was very loath and reluctant to enter into a NRA Code and that you were asked by the officials of the NRA to provide some supplemental trade practices?

A. Simply that my Executive Committee and
2398 Board of Directors entered with no enthusiasm whatsoever into the whole NRA idea. We were one of the last industries I believe that even considered the idea of formulating a Code. After we had gotten under way it looked as if we should only have a labor code. Thereupon Mr. Janssen, then the Deputy Administrator, and Mr. McFarland of the legal department, came to me and talked to some of the board members and insisted that we have some trade practices.

Q. Who insisted that?

A. Mr. Janssen and Mr. McFarland of the legal department at that time. They were quite insistent that we have some trade practice or some supplementary code, put it that way, which would, presumably, give us something in return for our going along with this labor idea of the Administration.

Q. What do you mean, "give you something in return"?

A. Well, it was quite obvious in those days that industry was by acceding to the desires of the Administration to limit hours in order to spread work, and to have other labor privileges recognized by code, that industry in return should have an opportunity to do things which normally would be frowned upon by the authorities, in the way of getting together for, if you will, putting it brutally, price fixing, or devising trade practices that would stabilize industry, and so forth.

Q. When did the matter of possible NRA code first come
up in any division of the lead industries association?

2399 A. Mr. Wright, I would have to look through the records to answer that question, sir. I don't recall offhand.

Q. I direct your attention to Respondents' Exhibit 42-A, directors meeting minutes of June 15, 1933, paragraph

headed, "1. National Industrial Recovery Act." Do you recall that meeting?

A. Yes, sir.

Q. It appears from the minutes that the National Industrial Recovery Act had not yet been enacted into law at the time of that meeting.

A. That is right.

Q. Yet the board of directors was at that time contemplating the drafting of a code.

A. Well, it was quite obvious that we as an industry, if Congress choosed to pass the National Recovery Act, would be expected to do our part, and of course, one of the first things that was promulgated was this, as I recall it, President's Reemployment Agreement, which involved the accumulation of labor, hours worked, and wages paid, and so forth, under the theory that the Recovery Act would spread employment. So that was our effort to go along with the wishes of Congress.

Q. At that meeting you were directed to contact the officials in Washington for the purpose of discussing a program which the Lead Industries Association might adopt as appears in the minutes of that meeting?

2400 A. Yes, sir.

Q. Exhibit 42-F.

A. Yes.

Q. You went to Washington, did you, in response to that direction?

A. Yes, sir.

Q. Who prepared the first draft of the NRA Code, Mr. Wormser?

Mr. Du Bosé: Are you talking about the supplemental code?

Mr. Wright: The supplemental code, yes.

The Witness: I don't recall, Mr. Wright. I think a group of us sat down to draft it at one of those meetings that we had.

By Mr. Wright:

Q. When was that, in the summer or was it in the fall?

A. That I wouldn't be able to help you on either without referring to the records. It is all in our records, whatever it was that we did.

Q. Then there is a complete story in here of what was done in regard to the various drafts?

A. Yes, sir; that is a complete record.

Q. Including the insistence of NRA officials that you adopt supplemental provisions?

A. I think you will find that may be indirectly referred to in the letter that we wrote to one of the—I think
2401 it was a Major Barry, who, after the NRA was declared illegal, wanted to revive interest in it and asked for our opinion, and we wrote him quite frankly how we felt about it.

Q. Was Mr. Barry connected with the NRA at that time?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: May we have the last question read?

(Question read.)

The Witness: I believe he was.

By Mr. Wright:

Q. At the time he wrote you?

A. Yes, sir.

Q. Hadn't the NRA been terminated by the Schecter decision at that time?

A. I believe he had some status, however, that enabled him to speak with some authority.

Q. You don't know what that authority might have been?

A. No, sir.

Q. But it was after the decision?

A. Yes, sir.

Q. So that wouldn't have anything to do with the Code period?

A. No, it was an effort on his part, presumably because there was some sentiment by industry in the United
2402 States, to revive the NRA. He acted as the spearhead for that movement.

Q. Now, on the mechanics of the operation of the Lead Industries Association in that NRA and pre-NRA period, were drafts of supplemental codes submitted to the Executive Committee from the various subdivisions?

A. For final approval?

Q. For final approval.

A. Prior to submission to the Washington authorities.

Q. And the Executive Committee then had the final approval of the Association on this?

A. Yes.

Q. There was no further action necessary?

A. No, sir.

Q. Beyond that?

A. No, sir.

Q. Do I recall your testimony on direct examination correctly to the effect that Schedule A of the Code as finally adopted was never made operative officially?

A. That is correct. That is the Schedule A was the one of the supplemental code, as I recall,

Q. Yes, sir.

A. That was never made operative.

Q. Then the only portion of the code which actually was operative was the code without the schedule except for Section 2 of Article 7 relating to price violations?

2403 A. I look back upon it as merely a labor code, that is all we had, all the rest of the verbiage was out the window, as it were.

Q. I see. Now, I direct your attention to Respondents' Exhibit 82-D and E, which appears to be attached o the minutes of the Executive Committee meeting on November 6, 1933. Would you refresh your recollection on that? (Handing document to the witness.)

A. Yes.

Q. Now, did that draft of that code represent the work of the Pigments Division up to that date, October 5, 1933?

A. Yes, sir.

Q. And that includes all that was adopted for submission to NRA up to that point?

A. Up to that point, that is correct, sir.

Q. When was the final draft of the code submitted to NRA?

A. You mean the master code with the supplement?

Q. The supplement code, when was that finally submitted?

A. I would again have to refer to the record, Mr. Wright; I don't recall when that was.

Q. It was after the 1st of January, wasn't it, 1934?

A. I believe so, because this was November 6, 1933.

Q. Now, you testified that all of the matters which were taken up at these meetings of the Pigments Division, and various sub-organizations during the fall of 1933 and

2404 early part of 1934, were for discussing subjects for adoption and inclusion in the supplemental code; is that correct?

A. Yes.

Q. So that whenever the minutes show that the matter was adopted that was adopted for inclusion in a proposed code, so far as you know?

A. So far as I know, that is correct.

Q. How do you account for the fact that some of these things are shown by the minutes to have been adopted when comparison of drafts of the codes which were prepared do not contain any reference to them?

Mr. DuBose: I object, if your Honor please. He doesn't have to account for anything. The form of the question is bad.

Trial Examiner Norwood: I take it he is asking him to explain it, if he knows the explanation.

Mr. Wright: That is correct, and I will so amend the question.

The Witness: May I have the question?

(Question read.)

The Witness: My feeling, Mr. Wright, is that in between these episodes that you describe there were frequent conferences in Washington with the NRA officials or there were telephone calls to us repeatedly prodding us to get the job done, and I dare say it was a conflict of viewpoint 2405 as to what should go in and what should not go in.

By Mr. Wright:

Q. Then were there conferences between the respondents and pigments producers which were not reported in these minutes?

A. Oh, no, sir. I refer to conversations between myself and Mr. Janssen and his counsel in the NRA.

Q. Did you have authority to change the drafts of the code on consultation with Mr. Janssen without taking that matter up again with the Division?

A. No, sir. Whenever changes were suggested I would submit it to the people at interest and let them pass on the advisability.

Q. Were some changes made in the drafts by that means, by your contacting individual producers?

A. I think, Mr. Wright, various drafts speak for themselves. In our minutes we had several drafts of the code before they were satisfactory for submission to Washington. I think we have all the drafts, as a matter of fact, in the record.

Q. Did any reference to any zone system or zone differential ever appear in any draft of a code in that period?

A. No, sir; to the best of my knowledge nothing was ever done on a zone system.

Q. In so far as the code—

A. So far as the code is concerned.

Q. Now, with reference to adoption of consign-
2406 ment contracts, was anything ever in any draft of a code relating to either selling or not selling on consignment—of the lead code I am speaking now.

A. I believe there is some stipulation about it, Mr. Wright, but again my memory would have to be refreshed by reference to these minutes because the white lead people were very desirous of selling—

Q. Who do you mean by the white lead people?

A. The white lead-in-oil producers.

Q. Does that include all of the white lead-in-oil producers?

A. Not all because some didn't care to sell on consignment and there was some division of opinion there, but the paint industry wanted to prohibit the sale of merchandise on consignment, and there—

Q. Who do you mean, the paint industry?

A. I mean the prepared paint industry, as represented by the National Paint, Varnish and Lacquer Association.

Q. Mr. Wormser, I take it that all of your testimony relating to agreements and understandings as to what should go into the code—or, it is limited as to what should go in code. I believe that was your testimony, that all of these discussions related to what should go in the code?

A. Exclusively to code provisions, yes, sir.

Q. Are you familiar with the marketing practices of each of the individual producers of pigments?

2407 A. No, sir.

Q. Were you at that time familiar?

A. Only sufficiently to be aware of a service I could be in the drafting of their supplemental codes. I tried to become familiar with it.

Q. In other words, you wouldn't know at any particular time whether the National Lead Company was quoting an lcl differential on dry white lead or not?

A. No, sir.

Q. In these discussions that we have been speaking of as to what should go in the code, did they involve discus-

sions of industry practices in connection with marketing and sale of lead pigments that had applied in the past?

A. Well, they involved discussions which are indicated right in the minutes themselves.

Q. In other words, they involved all the marketing practices that were then employed in the industry, I take it?

A. You say all. I wouldn't be able to answer whether it involved 100 per cent of the practices.

Q. Principal marketing practices?

A. Even there I don't know whether I could go along because I don't know whether those would be the principal ones or not, but I will say they were the practices that the group was desirous of having covered by those supplemental codes.

Q. Did the discussions also involve what changes
2408 would be desirable in existing practices under the code, what improvements could be made in industry practice?

A. Yes; again, limited to the code.

Q. You state you do not know what the practices of individual producers are from time to time?

A. That is right.

Q. So then you wouldn't know whether following one of these discussions the producers might make, each of them, a change in his existing practice regarding something that had been discussed at one of these meetings?

A. I have no knowledge of it.

Q. Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?

Mr. Ewing: I would object to that, your Honor. It is purely speculative.

Mr. Wright: I submit that the witness has testified there was no agreement or understanding at these meetings. I want to bring out clearly the extent of his knowledge as to what happened.

Mr. Ewing: The question states, "It is entirely possible."

Trial Examiner Norwood: Read the question.

Mr. Wright: I am asking for his opinion on whether it is possible.

2409 Trial Examiner Norwood: Read the question.

(Question read as follows:

"Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?")

Trial Examiner Norwood: Overruled.

The Witness: It is entirely possible that they could have jumped out of the window or done anything.

Trial Examiner Norwood: Answer the question directly.

The Witness: May I have it read once again?

(Question read as follows:

"Then it is entirely possible that the respondents could have left these meetings after having discussed these matters and put the practices into effect that they had been discussing?")

The Witness: Yes, it is possible.

Mr. DuBose: I move to strike the answer as being based on a purely speculative question. I do that so that there will be no question as to our position.

Trial Examiner Norwood: Counsel may so move. The motion is denied.

Mr. DuBose: Exception.

By Mr. Wright:

Q. Mr. Wormser, you state that you are not famil-
2410 iar with their pricing and marketing practices, those of individual companies, from time to time. I believe that was your testimony a moment ago.

A. Yes, sir.

Q. Are you familiar with the costs of production of lead pigments of the various individual respondents?

A. No, sir.

Q. From time to time?

A. No, sir.

Q. Didn't you state on direct examination that one effect of the paint code would have been to raise the price of white lead because it would have put the lead producers under the stricter costing provisions of the paint code?

A. Yes, but that has nothing to do with the cost of production of the individuals. That has no direct relationship.

Q. Well, if you don't know what the cost of production is how would you know what costing provisions—how it would affect the individual producers?

Mr. Ewing: I object to that, your Honor, as being purely argumentative.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think that is all right on cross-examination.

Mr. Wright: May I withdraw the question? It is 2411 clumsily put. I will reframe it.

By Mr. Wright:

Q. Mr. Wormser, in view of your statement that you do not know the costs of the individual producers, will you explain how you know that application of the costing provisions in the paint code would have raised the price of white lead-in-oil?

A. As I recall, Mr. Wright, the cost provisions of the paint code contained a lot of items which would have raised the costs theoretically to a greater level than if those particular items were taken out of the calculations of cost.

Q. I hand you a copy of the paint code and direct your attention to Article 22, "Selling below cost."

Mr. DuBose: Do you have the exhibit number of that?

Mr. Wright: I don't have it. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: I think it is Respondents' Exhibit 12.

By Mr. Wright:

Q. What costing provisions are you referring to now that would have operated to raise the price of white lead-in-oil?

A. Well, here is an item, the very first one that catches my eye, it says, "The cost of all other products shall include the following: The seller's total market replacement cost of raw materials (based on costs furnished 2412 monthly, or oftener, if necessary, by authority of the Paint Industry Recovery Board through Association Headquarters, subject to approval by the Administrator)—"

Now, the Paint Industry Recovery Board was that paint association, in large measure, and if they could arbitrarily decide what they wanted to put in for a basic cost obviously that would raise the costs of the white lead-in-oil people.

Q. If you don't know the costing practices and costs of the lead pigments producers, can you state with certainty that the same measures might not have been applied with them?

A. Again, Mr. Wright, I fail to see the connection between the two. I think it is a matter of principle involved. Whether you are going to proceed in getting your costs on what you absolutely consider are your costs of production, or whether you use the arbitrary formula such as developed by the paint industry. I don't think it has any bearing on what the actual costs are, or any knowledge of the costs, because I actually haven't got any.

Q. You have no knowledge of what the individual costs were?

A. No, sir.

Q. You speak of the paint industry, paint, varnish and lacquer code authority. I assume you are speaking of the paint industry collectively now?

A. Yes, sir.

Q. Who were the largest producers of paint in that industry?

2413 A. I would say DuPont and Sears Roebuck and Sherwin-Williams—I would say those are the three largest, but there again, in that period, I would hate to trust my memory.

Q. Does the Eagle Picher Company produce mixed paint?

A. No, sir.

Q. Does the National Lead Company produce mixed paint?

A. Speaking of that particular time?

Q. I will speak of it now.

A. No, sir.

Q. Did they at that time?

A. No, sir.

Q. Have they ever been a factor in the mixed paint business?

A. They have a branch on the Pacific Coast that makes prepared paints.

Q. What is the name of that enterprise? Is that National Lead Company, or does that carry a different name?

A. It carries another.

Q. Is it the Bass-Heutter?

A. Bass-Heutter Company, although I think by now—I think it is all part of the parent organization.

Q. How large an operation is that, do you know?

A. No, I don't know, Mr. Wright; comparatively small, I would say.

Q. Mr. Wormser, I call your attention to Commission's Exhibit 505-A, which is the minutes of the meeting of the White Lead-in-Oil Committee, Lead Pigments
2414 Division, on October 28, 1933. The statement appears therein, "Freight and zoning problems were discussed without any understanding or agreement being made." Was it customary to note after discussions when no agreement or understanding was made in the minutes?

A. I don't know how to answer that, Mr. Wright. All the minutes were designed to do was to give an accurate record of the business taken up and transacted at these various meetings.

Q. Aren't there many instances in the minutes—are there many instances in the minutes where subjects are noted as having been discussed without any mention of whether or not an agreement was reached?

A. I think you will find some, Mr. Wright, but again I would have to look through the record to see what cases there were that would fall in that class.

Q. I direct your attention, Mr. Wormser, to Commission's Exhibit 508-B, which is a letter from Mr. F. O. Case, manager, Anaconda Zinc Oxide Department, to you, under date of July 24, to the Class 2 paragraphs of that letter.

A. Yes.

Q. Do you recall whether that matter was discussed at the meeting of—

Mr. Wright: Withdraw that question.

By Mr. Wright:

Q. I also direct your attention to Commission's
2415 Exhibit 508-A, which is a reply to that letter of Mr. Case.

A. Yes.

Q. Do you recall whether that matter of l.c.l. differential on dry white lead was discussed at the next meeting?

A. Again, I would have to refer to the record, Mr. Wright. That would be the answer that I would have to give you because it is all in the record if it was discussed.

Q. I direct your attention to this meeting of August 8—

Mr. DuBose: Of the dry products?

Mr. Wright: Yes.

By Mr. Wright:

Q. Are you familiar with what the practice was in 1933 with reference to having an l.c.l., or less than carload, differential on dry white lead?

A. No, sir.

Q. You do not know whether any of the manufacturers had such a differential or did not have such a differential?

A. No, sir.

Q. Nor whether they had at any subsequent time?

A. No, sir.

Q. Was there ever any discussion in that period of practices which it was contemplated that the individual producer would put into effect in their own marketing of lead pigments?

A. Again I must refer to the record, Mr. Wright.

Q. Beyond the record you have no recollection of
2416 whether there were or not?

A. Beyond the record I have no recollection of any discussions that relate to this particular point.

Q. Do you recall any discussions regarding putting into practice any of these matters which were discussed as going into the code, regarding the material which later appeared in Schedule A of the code, regarding the differentials between grades on red lead or the differential contracts?

A. No, sir.

Q. Or the dry white lead contracts?

A. No, sir.

Q. Are you familiar with the practice of quoting oxides on a differential over the price of pig lead?

A. Only vaguely, Mr. Wright. Not being in my backyard, as it were, I have never made an attempt to get thoroughly familiar with it. It hasn't been a problem that we have ever had to deal with at all, prior to the time the NRA law was passed, or after it was terminated.

Q. You don't know, then, what the practices of the individual companies were with reference to that type of quotation prior to the NRA?

A. Nor do I know what it is today.

Q. Then you are not an expert in the marketing practices of these respondents in the pigments field, I take it?

A. I am not an expert in marketing of those products.

2417 Q. Then the statement which appears in Respondents' Exhibit 137-A and B to the effect that it was the opinion of all present at that meeting of the Oxide Committee that the practice of selling oxide at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade, you have no knowledge then of that situation?

A. No, sir.

Q. And no recollection of the discussion which took place at that time?

A. No, sir.

Q. Are you familiar with the differential points under which the keg products of the industry were sold prior to the NRA?

A. No, sir.

Q. Are you familiar with the market quotations on lead pigments that appear in the Oil Paint and Drug Reporter?

A. You mean as of today?

Q. Well, as of today, yes.

A. No, sir.

Q. Are you familiar with them at any period of time back to 1930?

A. When you say familiar, Mr. Wright, I don't really know what you mean. I know that the Oil Paint and Drug Reporter has that information. If I want to refer to it I can go to it so I don't need to keep it in my mind.

2418 So in that respect I consider that I am familiar with it.

Q. Then, as I understand it, you have no recollection of particular marketing practices in that time that might be employed by the pigments producers?

A. That is correct.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will have a three-minute recess and then continue the examination.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Wright:

Q. Mr. Wormser, you testified about the pricing practices in the pig lead industry. Do you not know similar

information regarding lead pigments during the OPA period?

A. I have a general idea, Mr. Wright. Of course, in the NRA days I made it a point to get familiar with as much as I could of the problem that the producers faced, and especially in connection with the preparation of the supplemental code of fair competition. But the minute that was over I lost all interest in it and my own responsibilities went far afield.

Q. I assume you knew what Mr. Case was talking about when you replied to his letter there in your letter to
2419 him on July 27, 1933, Commission's Exhibit 508-A, when you said, "I shall see that the point you bring out for discussion about the l.c.l. differential is placed before the meeting."

A. Yes. That merely brings out what I tried to make clear, that in those days whenever any trade custom or trade practice was an item on the agenda for discussion among the people at interest, I saw to it that that was placed on the agenda, and that was one point that was brought up, I believe, by Mr. Case.

Q. You appreciated the problem that Mr. Case was raising there, did you not?

A. At that time, yes, sir.

Q. What was that problem—or that matter, rather?

A. It related to the proper differential to adopt in a supplemental code of fair competition on dry lead.

Q. Dry white lead?

A. Dry white lead, for shipments under five tons.

Q. Was that ever adopted in any proposed code or code as finally adopted?

A. I would have to refresh my memory, Mr. Wright, by reference to the records and to the supplemental code as it was finally drafted.

Q. Do you know what the practice was during the OPA with regard to less than carload differential for dry white lead?

A. Again I don't recall, Mr. Wright.

Q. Do you have a paper there which would re-
2420 fresh your recollection as to that differential?

A. No, sir; the papers I have related to pig lead entirely.

Q. I want to show you several documents and ask if they refresh your recollection any as to times at which

l.c.l. differentials for dry white lead were established and put into practice for the industry.

Mr. Ewing: I object to the question. He refers to the industry generally. There is no proof to show there is any industry response on the subject. I think it should be directed specifically to some individual respondent.

Trial Examiner Norwood: Read that question.

Mr. Ewing: He testified he doesn't know the practice of the individuals.

Mr. Wright: Your Honor, this gentleman has just finished testifying that he was familiar with this matter which relates to this differential.

Mr. DuBose: During NRA.

Mr. Wright: This document relates to that time.

Mr. Ewing: He testified that Mr. Case's letter related to a problem concerning l.c.l. differentials that Mr. Case wished presented to this particular committee for consideration in connection with the code. That is a quite different matter from that to which the present question is directed.

Mr. Wright: Your Honor, if these documents do
2421 refresh his recollection, certainly his recollection is a matter that is pertinent and relevant and admissible in this examination. I don't think any objection to an attempt to refresh his recollection can be entertained.

Trial Examiner Norwood: Read the question.

(Question read as follows:

"I want to show you several documents and ask if they refresh your recollection any as to times at which l.c.l. differentials for dry white lead were established and put into practice for the industry.")

Trial Examiner Norwood: I will overrule the objection and ask him to answer the question as it has been clarified by the discussion.

The Witness: Mr. Wright, this would indicate that at this particular period—

Mr. Ewing: May I interrupt and suggest that the answer be confined to whether the document refreshes the witness' recollection? That was the question.

Trial Examiner Norwood: The point is well taken. You may study the documents, and then if they refresh your recollection you may answer independently of any reference to the documents.

The Witness: My answer is no.

By Mr. Wright:

Q. At the time the code was finally put into op-
2422 eration, I believe it was early in June, 1934, were there any—do you recall any announcement of changes in trade practice by the individual pigments producers?

A. I don't recall, Mr. Wright.

Q. Do you recall whether at that time they announced the quoting of prices on a zone basis?

A. I don't know, Mr. Wright.

Q. Mr. Wormser, you testified on direct, as I recall it, that there were no agreements or understandings reached as to any of these trade practices at the meetings of the various divisions of the lead Industries Association other than that they were adopted for inclusion in a proposed code. Am I correct in that statement?

A. Yes, sir.

Q. What is your understanding of the term "agreement and understanding"?

A. You mean the legal definition?

Q. What was in your mind when you answered that question?

A. Well, I had in mind a mental vision of a group getting together and perhaps agreeing on a certain course of action with relation to marketing practices, or even, in those days, according to prices, because the sky was the limit in NRA days, it seemed to me.

Q. Would you consider it an agreement if a group of
2423 men met together and discussed the advisability of changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?

Mr. Ewing: I object. It calls for the witness' conclusion as to the operation of his mind.

Mr. Wright: Obviously it does. I am trying to find out what is in his mind when he answered the questions.

Trial Examiner Norwood: He is developing the witness' definition of the term which he used in the direct examination.

Mr. Wright: He expressed a conclusion when he answered those questions. I am trying to find out what that conclusion is.

Mr. Ewing: Could I have that question read? The

way it was phrased I don't think that it would accomplish the end Mr. Wright has in mind.

(Question read as follows:

"Would you consider it an agreement if a group of men met together and discussed the advisability of changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?")

Mr. Duncan: That asks him whether or not he would draw an inference; not whether or not he would con-
2424 sider that an agreement.

Mr. DuBose: Moreover, if it is a hypothetical question it contains statements as to which there has been no proof.

Trial Examiner Norwood: But it is not a hypothetical question—although it carries a hypothesis.

Mr. DuBose: That is speculative.

Trial Examiner Norwood: Objections overruled. Answer the question.

The Witness: Mr. Wright, may I have it repeated once more? It is such a long question.

(Question read as follows:

"Would you consider it an agreement if a group of men met together and discussed the advisability of changes in industry practice without formally spreading it on the minutes that they were in agreement, left the meeting, all announced individually that practices which had been discussed—as exemplary, as improvements?")

Mr. Duncan: If your Honor please, may I object for the added reason: I think the question asks of the witness, whether he poses as an expert or not, for a conclusion which only the Commission can reach, as to whether or not under those circumstances it would be violative of anything in this complaint.

Mr. Wright: The original question, your Honor,
2425 to which this goes, directly called for the same sort of conclusion and was objected to on the same ground.

Trial Examiner Norwood: Answer the question.

The Witness: Mr. Wright, if I understand your question correctly, you ask me if it is an agreement if a group meet outside the facilities of the Lead Industries Association, come to some common understanding. Well, not knowing what the—

Mr. Wright: No, that wasn't the question.

The Witness: I am afraid I don't grasp what your—what the significance of your question is—it is so long. It just says, "Is it an agreement if," and then comes a long series of reservations that, frankly, confuse me. I would like to answer the question. If you could put it some way that would bring out the point you have in mind, perhaps I could answer it.

Mr. Wright: I shall try to reframe the question for you.

By Mr. Wright:

Q. Would you consider it an agreement or understanding if a group of men were to meet together and discuss their existing marketing practices, the possibility of improving those marketing practices by taking certain specific steps, and then without expressing themselves as in agreement at the meeting, individually left the meeting and announced through their own companies the trade practices, changes in trade practices which had been discussed
2426 at the meeting as desirable?

Mr. DuBose: Same objections—all of them.

Trial Examiner Norwood: Yes.

The Witness: Discussed at this meeting outside?

Mr. Wright: No. This is a hypothetical question. We are not talking about any particular meeting of any particular group now.

Mr. DuBose: It has been admitted that this is a hypothetical question. Since it is so, and since it is based on facts as to which there has been no proof, then I submit it is an improper question.

Mr. Wright: I submit the record is replete of proof of exactly this.

Trial Examiner Norwood: I didn't agree that it was a hypothetical question. He has made a condition there, but I think the question is not hypothetical, but is a question on cross examination intended to elicit the witness' understanding of the word he used, the word "agreement".

Mr. Wright: That is correct, but the situation stated doesn't apply to any definite, specific instance.

Trial Examiner Norwood: No.

Mr. Wright: It is a hypothetical question for the purpose of testing the witness' understanding.

Mr. DuBose: Not as proof of any fact in this proceeding except as to his understanding?

2427 Mr. Wright: Except as to his understanding.

Mr. Duncan: Hasn't government counsel already elicited from this witness what he meant by the term "agreement", so that when he now questions him with respect to what, perhaps, the Commissioner has in mind, the term "agreement", he goes afield?

Trial Examiner Norwood: It goes to what he meant when he used that word.

Mr. Duncan: He has answered that.

Trial Examiner Norwood: He can answer it again. I don't know that he has, but we will allow him to answer it again if he has, and to further clarify the denotation of the word "agreement" as he understands and his using it.

Answer the question.

The Witness: May I have the latest version of Mr. Wright's question read to me, please?

(Question read as follows:

"Would you consider it an agreement or understanding if a group of men were to meet together and discuss their existing marketing practices, the possibility of improving those marketing practices by taking certain specific steps, and then without expressing themselves as in agreement at the meeting, individually left the meeting and announced through their own companies the trade practices, changes in trade practices which had been discussed at the
2428 meeting as desirable?")

The Witness: Your Honor, I think that is, if I may say so, I feel that is a legal question which I am not competent to answer.

Trial Examiner Norwood: Answer that question or say you can't answer it. Make what answer you can on that, throwing light on your understanding of the word "agreement" as you have heretofore used it in your testimony. In the circumstances he named, would you consider that that constituted agreement?

The Witness: I think it would be an agreement.

Mr. DuBose: I move to strike the answer upon the ground that this is an answer as to a legal conclusion as to which the witness has not been qualified as an expert; and in addition upon all the other grounds heretofore stated.

Trial Examiner Norwood: Motion denied.

Mr. Wright: Off the record for just a minute.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Your answer is that you would consider that an agreement?

A. Under those circumstances.

Mr. DuBose: Same objection to that.

Trial Examiner Norwood: Same ruling.

2429 By Mr. Wright:

Q. You have stated that you do not know what the individual marketing practices of the producers on lead pigments were in that period or in any other period.

Mr. Duncan: Objection. He has already answered that.

Trial Examiner Norwood: This is cross examination. He can answer it again.

Mr. Duncan: I thought there was some limit as to the number of times you could ask the same question.

Trial Examiner Norwood: There is a limit, but I think it is a matter of discretion for me to determine when we reach that limit. I don't recall that he has answered—brought out exactly this. Go ahead.

By Mr. Wright:

Q. Was it your testimony on direct—withdraw that.

Your own knowledge then as to what was in the minds of the people who attended these pigment division meetings was as they expressed themselves at the meeting; is that correct?

Mr. Wood: I object to that, your Honor, for the reason that I do not know how one can ask the witness what would be in the minds of people. How would anyone know other than what they expressed.

Trial Examiner Norwood: He is asking him as to his knowledge; not as to the mind of somebody else.

Mr. Wood: I thought his question was as to the
2430 mind of the other.

Trial Examiner Norwood: No.

Mr. Wood: May we have the question?

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Your own knowledge then as to what was in the minds of the people who attended these pigment division meetings was as they expressed themselves at the meeting; is that correct?")

Trial Examiner Norwood: Objection overruled. Answer that question.

The Witness: Of course, I had supplementary knowledge of fragmentary nature, to be sure, of the pigments and how they were used, and knew where quotations were made, so I can't truthfully say all my information was developed out of what was expressed at the meetings.

Mr. Duncan: Object to the answer, and ask that it go out of the record.

Trial Examiner Norwood: Motion denied.

Mr. Duncan: Exception.

By Mr. Wright:

Q. What was your knowledge then, on what specific subjects did you have knowledge beyond what was said at the meetings on these points that were raised at the meetings regarding the adoption of zones or less than
2431 carload differentials, or agency contracts?

A. Well, I had in mind the competitive position of white lead and red lead, Mr. Wright. The competition that it had to meet with other materials and the stake that the mining industry had in developing the market for white lead to the utmost.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive.

Mr. Ewing: I submit it is responsive.

Trial Examiner Norwood: Read the question and the answer.

Mr. Wright: Your Honor, the question was directed to specific information regarding specific subjects.

(Record read as follows:

"Q. What was your knowledge then, on what specific subjects did you have knowledge what was said at the meetings on these points that were raised at the meetings regarding the adoption of zones or less than carload differentials, or agency contracts?

"A. Well, I had in mind the competitive position of white lead and red lead, Mr. Wright. The competition that it had to meet with other materials and the stake that the mining industry had in developing the market for white lead to the utmost.")

Trial Examiner Norwood: You may question him further, but I think that is in an effort to answer your
2432 question. Motion denied.

By Mr. Wright:

Q. Do you have any specific information regarding zoning other than the expressions that up here in the minutes of these meetings?

A. No, sir.

Q. Do you have any specific information regarding less than carload or carload differentials beyond what appears in these minutes?

A. No, sir.

Q. Do you have any specific information regarding uniform contracts covering sales of lead pigments other than what appears in these minutes?

A. No, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until two o'clock.

(Whereupon, at 12:20 p. m., a recess was taken until 2:00 p. m., this day.)

2433 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Proceed.

FELIX E. WORMSER, resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Wormser, you testified earlier that you were not familiar at that time with the trade practices, marketing practices employed by the individual companies in selling lead pigments and that you are not familiar with the changes that might have been made in those practices up to the present time; is that correct?

A. That is correct.

Q. But at that time, during these code meetings, you were present at discussions of those practices?

A. Yes, sir.

Q. Are you acquainted with Mr. Harold Rowe of the National Lead Company?

A. Yes, sir.

Q. He was present during a good many of those discussions, was he not, back in the code period?

A. I believe he was.

Q. Are you acquainted with Mr. Zoller of the
2434 Eagle Picher Company?

A. I am.

Q. Now, it was testified to by Mr. Rowe that the zones used by the National Lead Company on quoting on their pigments had been employed by that company since some time in the period between the fall of 1933 and the summer of 1934. It was testified to by Mr. Zoller of the Eagle Picher Company that most of the provisions which appeared in the Schedule A of the code had been employed by the Eagle Picher Company in its marketing of oxides since, approximately, the period of the code. I want to call your attention to Commission's Exhibit 808-E, which is copy of page 30 of the Oil, Paint and Drug Reporter for June 4, 1934, to the statement that appears there:

"With the lead industry's code becoming effective today, it is understood that other changes are taking place in the style of pricing lead oxides. Prices are to be established on a zone basis with the former Eastern prices applying in the New England, Middle Atlantic States and Midwestern areas. Southern and Gulf States delivered prices may be a quarter cent per pound higher than the basic prices, and the Pacific Coast and Rocky Mountain area will also carry a price differential, but the differentials have not been definitely established as this is written."

And also to the issue of the Oil, Paint and Drug
2435 Reporter of June 11, 1934, which appears in the record as Commission's Exhibit 808-H, the statement:

"Following the inauguration of the lead industry's code, corroders of white lead and lead oxides revised price schedules last week. There is no basic change in the prices, but differentials for certain delivery points have been changed, and at some few delivery points in the Rocky Mountain area, the revised prices represent a fractional change in favor of the buyer."

Does that refresh your recollection as to any change in the trade practices which occurred in that period on the part of individual producers of lead pigments?

A. No, sir.

Mr. Wood: I object, your Honor. I object to the sum-

mary of Mr. Zoller's testimony. I am perfectly willing for the witness to be shown the testimony and asked the same question.

Trial Examiner Norwood: Well he has pointed out the particulars in which he expects the exhibit to refresh. I think he may do that on cross-examination.

Mr. Wood: I do not know that the summary of Mr. Zoller's testimony is correct or incorrect. On principle I object to the use of his own summary of what some witness testified as grounds for attempting to refresh the recollection of the witness. The question has been answered,
2436 so it is a dead issue, you might say.

Trial Examiner Norwood: Well, I will give counsel the benefit of an exception on that. Overrule it.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Mr. Wormser, at the date of Commission's Exhibit 808-H you were in what capacity with the Code Authority, June 11, 1934?

A. Was that after the code had been approved by the NRA?

Q. I believe it is, Yes, sir.

A. If it is, I was secretary of the code authority.

Q. And also secretary of the Lead Industries?

A. Secretary of the Lead Industries Association.

Q. And your testimony is, then, that, occupying these positions, with these occurrences in the industry, you were unaware of them?

A. I was unaware of them. I don't know where Oil, Paint and Drug Reporter got that.

Q. I direct your attention to Respondent's Exhibit No. 94-B, wherein reference is made to Exhibit A attached to the minutes of the meeting of June 23, 1936.

A. Yes.

Q. Are you familiar with that brief which is men-
2437 tioned in that portion?

A. Yes, sir.

Q. Of Exhibit 94-B?

A. Yes, sir.

Q. Do you have that document in your possession?

A. Yes, sir. (Handing document to counsel.)

Q. Do you recall the provisions of that proposed legislation to which this document was addressed?

A. Only vaguely, Mr. Wright.

Q. Did this document state the position of the Lead Industries Association with reference to the provisions of that legislation?

A. I would say that it did, but it never was formally approved for submission to the Senate Committee, I believe.

Q. It was approved then, according those minutes, was if not, as the expression of the industry?

Mr. Ewing: I object. The minutes speak for themselves and my recollection is that the secretary was directed to prepare a brief to be used subsequently if it seemed advisable.

Trial Examiner Norwood: How was that question?

(Question read.)

Mr. Ewing: I object further on the ground that the question relates to a document which is not identified except as being produced by the witness and not in evidence.

2438 Mr. Wright: On that point, your Honor, this document was omitted from an offer of the minutes of this particular meeting, although it was discussed in the minutes which are in evidence, and referred to as attached and a part of the minutes.

Mr. Ewing: It was omitted from the offer, as I stated at the time, for the reason it had not the formal approval of the Association, and was never used. We therefore did not feel justified in offering it. If Mr. Wright wants to offer it, all right.

Trial Examiner Norwood: He can direct questions to it, to the identification of that paper.

Mr. Ewing: It has already been identified. This question goes to the relationship of its contents to the intent or the attitude of the Association.

Trial Examiner Norwood: You are asking about a paper?

Mr. Wright: I am asking about a paper in evidence, namely, Respondent's Exhibit 94-B. I am examining him with reference to what that action purports to be which is reported in the minutes. The question didn't go to the contents.

Trial Examiner Norwood: But you mentioned Exhibit A to this exhibit.

Mr. Wright: That is right.

Trial Examiner Norwood: You are basing a question on that Exhibit A to this exhibit is not in evidence at this time.

2439 Mr. Wright: Right now, but it is discussed in a document already in evidence, as being drafted by the Lead Industries Association.

Mr. Ewing: Not by the Lead Industries Association, by Mr. Wormser individually.

Trial Examiner Norwood: I think you will have to read the last question, Mr. Reporter.

(Question read as follows:

"It was approved then, according to those minutes, was it not, as the expression of the industry?")

Trial Examiner Norwood: "It" being this exhibit A which is not in evidence?

Mr. Wright: Yes, sir, as stated on Respondent's Exhibit 94-B.

Trial Examiner Norwood: You are asking whether that paper was approved by the committee?

Mr. Wright: I am asking him whether the document referred to in that minute was adopted as an expression of the Lead Industries Association.

Trial Examiner Norwood: I think he can answer that question. He is not referring to the contents of it in any way.

Mr. Ewing: What meaning has the question without the contents being before the Commission?

Trial Examiner Norwood: He has a right to do
2440 that by way of identifying the paper.

Mr. Ewing: There is no dispute about the identification of the paper.

Trial Examiner Norwood: I will overrule the objection. Let him answer the question.

The Witness: What is the question?

(Question read as follows:

"It was approved then, according to those minutes, was it not, as the expression of the industry?")

The Witness: My answer is no.

Mr. Wright: I would like for this document to be marked for identification as Commission's Exhibit 855-A, B, C, D, and E.

(The document referred to was marked Commission's Exhibit 855-A through 855-E, both inclusive, for identification.)

By Mr. Wright:

Q. I show you document marked Commission's Exhibit 855-A, B, C, D, and E, and ask you if that is the document referred to on Respondent's Exhibit 94-B as Exhibit A attached to the minutes of the executive meeting of Lead Industries Association on June 22, 1936.

A. It is.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

2441 (Discussion off the record.)

Mr. Wright: I offer Commission's Exhibit 855, with sub-numbers, in evidence.

Mr. Duncan: We object, on behalf of Glidden, on the ground that it is not binding on the Glidden Company.

Trial Examiner Norwood: Objection overruled.

Mr. Du Bose: May the same objection run to all respondents?

Trial Examiner Norwood: Yes.

Mr. Ewing: Based on the proposition that this brief was prepared by Mr. Wormser at the direction of the executive committee as shown by the minutes of the executive committee's meeting of April 10, 1936, Respondents' Exhibit 93, and that it was never in fact formally adopted or used.

Mr. Du Bose: And that it represented Mr. Wormser's personal thoughts on the subject, but has not been approved, and therefore was not binding upon any of the respondents.

Mr. Wright: Your Honor, counsel are identifying this document when it properly—those aspects ought to be gone into by the evidence.

Mr. Du Bose: It is already in evidence that it wasn't formally approved—in answer to your question, Mr. Wright.

Trial Examiner Norwood: It is in evidence that the paper was discussed and it is referred to in this exhibit.

Mr. Wright: It is a part of the exhibit which is in

2442 evidence.

Trial Examiner Norwood: Part of that exhibit, and in keeping with our policy heretofore about permitting the other side to complete the picture, I think it is only right to proceed with the paper. Counsel will have the benefit of their exceptions and Commission's Exhibit 855-A, B, C, D, and E is received in evidence.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 855-A through 855-E, both inclusive, were received in evidence.)

By Mr. Wright:

Q. Mr. Wormser, I call your attention to Respondents' Exhibit 93, the minutes of the executive committee, stating, "The committee was unanimously opposed to the bill S. 4055 * * *" Did you follow the instructions that appear there in Respondents' Exhibit 93?

A. I did.

Q. Then this brief is, as stated there, drawn up in accordance with the—based upon the discussion which took place at that meeting; is that correct?

A. Yes.

Q. It did represent the views which were expressed at that meeting?

A. As nearly as I could reflect them with my own composition.

Q. Mr. Wormser, I direct your attention to Re-2443 spondents' Exhibit 129-X, which is Exhibit G to the minutes of the Code Authority meeting of August 20, 1934.

A. Yes.

Q. And also to 129-G, where that letter from the Oxidite Battery Manufacturing Company is discussed in the minutes. Do you have any recollection of that situation?

A. No, sir.

Q. Do you have any recollection of the situation about which the letter 129-X speaks?

A. Only what is contained in the record, Mr. Wright.

Q. You have no knowledge, then, of any discount based on carload purchases of oxides as discussed in that letter?

A. No, sir.

Q. I direct your attention to the fact that the letter 129-X refers to the fact that "we are now compelled to buy this carload in one shipment, or pay a penalty of approximately 20 per cent." That is dated July 27, 1934. And that the minute, 129-G, directs, authorizes you to call the attention of that company to the fact that Schedule A of the Code had been suspended. How do you account for the fact—can you explain the fact that if that Schedule A was never made operative, nevertheless a com-

plaint was received as to trade practices which were covered by that Schedule A?

Mr. Du Bose: When you say that the minutes there show that the secretary was authorized to direct the
2444 battery company's attention to the fact that Schedule A had been suspended, I believe the minutes state that the secretary was directed to pass it along to the Lead Pigments Division, calling their attention to the fact that Schedule A had been suspended.

Mr. Ewing: Furthermore, the letter 129-X shows on its face that it does not refer to a specific complaint with respect to a specific transaction, because it starts by saying, "we wish to comment on one of the terms of the Lead Indusfries Code which is a big handicap to us." In other words, it is a reference to the code alone and not to any imposition of the terms of the code, as the question implies.

Mr. Wright: In answer to that I may say, your Honor, it says on its face, "We are now compelled to * * *".

Mr. Ewing: That is under the terms of the code, which is the first sentence, and it says, "Under the terms of this code, we are now compelled." It doesn't refer to anybody having compelled them.

Trial Examiner Norwood: What is the question?

(Question read as follows:

"I direct your attention to the fact that the letter 129-X refers to the fact that 'we are now compelled to buy this carload in one shipment, or pay a penalty of approximately 20 per cent.' That is dated July 27, 1934. And that the minute, 129-G, directs, authorizes you to call the
2445 attention of that company to the fact that Schedule A of the Code had been suspended. How do you account for the fact—can you explain the fact that if that Schedule A was never made operative, nevertheless a complaint was received as to trade practices which were covered by that Schedule A?")

Trial Examiner Norwood: Objection overruled.

Mr. Ewing: The question implies, "How does this witness account for the fact that this particular company could make a complaint if the terms of the code never became operative?" Now, it is implicit in that the suggestion that somebody was enforcing the terms of the code.

Mr. Wright: That is correct.

Mr. Ewing: And the letter plainly shows that it was not in connection with any attempt to enforce one of the terms of the code. The complaint was directed against the code itself.

Trial Examiner Norwood: Here is some evidence in the record, Respondents' Exhibit 129-X. Here is some evidence, in the code, which might indicate that the complaint was made. You haven't laid the grounds here for this witness' knowledge of that or made the situation such that it is incumbent upon him to account for it.

Mr. Wright: Your Honor, he was secretary of the Code Authority. The letter is addressed to him. The ques-
2446 tion asks him to account for the fact that the letter refers to an existing injury in view of the statement in the exhibits and in his testimony that that never was made operative.

Mr. Ewing: The letter refers to no existing injury whatever. You are reading something into it.

Trial Examiner Norwood: Ask him if there was in fact such a complaint.

Mr. Wright: It is in the record already as such a complaint.

Mr. Ewing: The record shows specifically, "We wish to comment on one of the terms of the Lead Industries Code, which is a big handicap to us."

Trial Examiner Norwood: He is under cross-examination, and he may be asked to explain that.

Mr. Ewing: I object to the form of a question which carries with it the implication that it does in this case.

Trial Examiner Norwood: I sustain the objection to the question in its present form, but he may be asked about this thing and he may be asked to reconcile this with some of his own testimony.

Mr. Ewing: Certainly.

Mr. Wright: That, your Honor, was the sole purpose of the question.

Trial Examiner Norwood: I think so. I think counsel can ask more directly.

2447 By Mr. Wright:

Q. I believe you stated you had no independent recollection of that correspondence, Mr. Wormser; is that correct?

A. Yes, sir.

Q. So far as you know Schedule A of the code was never made operative?

A. Never made operative.

Q. Do you have any recollection that this indicated to you a complaint received about a differential which was under Schedule A of the Code?

A. I believe the explanation might be, Mr. Wright, that this gentleman, of this battery company, may have seen published reports.

Q. Do you know that that is the explanation?

A. No, I don't. You asked for my explanation. I am trying to arrive at an explanation.

Q. When you received that, did you consider that was a complaint about practices which were then current?

A. No, sir. I considered it, however, information which the Lead Pigments Division should have.

Q. If that were a complaint about practices which were in existence at that time would that indicate to you that the provisions covered in Schedule A of the Code had been put into effect by the Pigments producers themselves?

Mr. Du Bose: That is argumentative.

2448 Trial Examiner Norwood: I think he may answer that, on cross-examination.

Mr. Du Bose: Purely argumentative.

Trial Examiner Norwood: I don't agree with counsel fully in its being pure argument.

The Witness: What is the question?

(Question read.)

The Witness: Not necessarily, because the fact that the code, or that particular provision of the code was suspended, might not have been knowledge possessed by this man who wrote this letter.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Redirect.

Mr. Ewing: We have no redirect, Mr. Examiner. We would like to reserve, and I don't suppose it is necessary, the right to recall at some future time for further direct, if we should deem it advisable, Mr. Wormser, but as far as redirect in the proper sense of the word is concerned, we have none.

Trial Examiner Norwood: You may recall him at any time.

Mr. Ewing: Yes.

Trial Examiner Norwood: Well, what is your further pleasure, gentlemen?

Mr. Ewing: Now, I suppose we should go off the
2449 record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

The motion is allowed for adjournment at this time to reconvene in Room 332, of the Federal Trade Commission, Washington, D. C., at ten o'clock a. m., whatever is the prevailing time, on Tuesday, May 13, 1947, and it is further contemplated that we hold a session thereafter beginning on June 10th in Washington.

(Whereupon, at 2:45 p. m., Wednesday, May 7, 1947, the hearing in the above-entitled matter was adjourned.)

2450

Room 332, Federal Trade Commission Building, Washington, D. C., Tuesday, May 13, 1947.

Met, pursuant to adjournment, at 9:00 a.m., E.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick, & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2451 John A. Duncan, Esq., (1649 Union Commercial Building, Cleveland 14, Ohio), and

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2452 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 7th day of May, the hearing in Docket 5253 is now convened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 9 o'clock E.S.T., on the 13th day of May, 1947.

The reporter will please note the appearances.

Proceed, gentlemen.

Mr. Duncan: Mr. Sprague, will you come forward and be sworn.

PAUL E. SPRAGUE was thereupon called as a witness for the respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Duncan.

Q. Please state your name and address.

A. Paul E. Sprague, Cleveland, Ohio.

Q. Are you a Vice President of The Glidden Company?

A. Yes, sir.

Q. How long have you been with The Glidden Company?

A. Since 1915.

Q. Then you were with the old Glidden Paint & Varnish Company?

A. That is right.

2453 Q. That was the predecessor of The Glidden Company which was formed in 1917?

A. That is correct.

Q. Will you tell us what your duties are at the present time?

A. I am in charge of the operations of the soya bean business, the feed business, and part of the food business.

Q. How long have you been so employed by The Glidden Company?

A. Since 1945.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, I would like to request a segregation of witnesses if there are any other witnesses.

Mr. Duncan: Well, Your Honor, in the room at this time are Mr. Arthur Knight of The Glidden Company, he is in charge of the Lead Division of The Glidden Company and he is from Scranton; also in the room is Mr. David N. Burruss, Jr., who is in charge of the Metals Refining Division of The Glidden Company, and he is from Hammond, Indiana. We intend to put on Mr. Burruss as a witness, and we may put Mr. Knight on. But it is our contention that these gentlemen are sufficiently high up in The Glidden Company so that frankly, an order of separation of witnesses should not be granted at this time.

Mr. Wright: I don't see what their position in the company has to do with the propriety of separating
2454 the witnesses.

Trial Examiner Norwood: They are parties to the suit.

Mr. Hinds: May I add that each of these gentlemen is the highest official next to the top executives, with respect to the industry which is under charge here, and without their presence here in court we would be greatly handicapped. I will be consulting Mr. Knight continuously, we will be consulting Mr. Burruss, they are clients, they are the accused in this case.

Trial Examiner Norwood: Are there any other witnesses in here? I don't see how it is practicable to exclude them, Mr. Wright. In any other circumstances I always exclude the witnesses if anyone makes such a motion, but in a case like that it is different.

Mr. Wright: Your Honor, I don't see how, when counsel for The Glidden Company are examining one of their witnesses, the other witnesses are necessary for consultation while they are examining a witness of their own.

Mr. Gardiner: If Your Honor please, you asked if there were any other witnesses present. It is possible that one of the gentlemen present here may testify for the International Smelting & Refining Company. That hasn't been determined yet.

Trial Examiner Norwood: One of the officials of these respondents?

2455 Mr. Gardiner: He is an employee of one of the respondents, he is not an official.

Trial Examiner Norwood: Well, I think—

Mr. Gardjner (Interposing) He would not testify this week, and may not testify at all. I merely mention that because you asked if there were any other witnesses present. It is not contemplated that at the present time he will be called, but he might be.

Trial Examiner Norwood: Under the circumstances I deny the motion. Go ahead.

By Mr. Duncan:

Q. Mr. Sprague, have you ever been in charge of the sales of the Chemical, Pigment, Lead and Material Divisions of Glidden?

A. Yes, I have.

Q. For how long?

A. For a period from 1935 to 1945.

Q. Were you ever in charge of the production and marketing of lead pigments for Glidden?

A. Yes.

Q. Since what time?

A. About 1925 to 1935.

Q. And when did the Glidden Company acquire the Euston Lead Company?

A. My recollection is that it was 1924.

2456 Q. Before that time, did Glidden sell white lead-in-oil?

A. Yes.

Q. To whom?

A. White lead-in-oil was sold by the Paint Divisions of The Glidden Company prior to that time, to the general trade that their salesmen contacted.

Q. Can you give us a date as to about when The Glidden Company started to job white lead-in-oil?

Mr. Wright: Objection, Your Honor. That is a leading question, and it contains a conclusion that is not in the record.

Mr. Duncan: This is preliminary, Your Honor.

Trial Examiner Norwood: I think it is more or less a preliminary question. Counsel will please refrain from leading on the main issue. The objection is overruled. Answer the question.

A. Glidden sold white lead-in-oil as early as 1921, and probably earlier.

By Mr. Duncan:

Q. And whose white lead-in-oil did it job?

A. Glidden sold white lead-in-oil as a jobber handling

the brands of the principal producers at that time; specifically, the National Lead Company and Eagle-Picher Company, and also manufactured and sold white lead-in-oil of its own.

Q. What was the product called?

2457 A. Glidden's manufactured product was sold under the trade name of Endurance White Lead-in-Oil.

Q. How was it priced at that time?

A. It was priced according to schedules similar to those employed by competitors, but at a price concession under that charged by its competitors, usually a half a cent per pound under the schedules of the market, and with premiums or increases over the base schedules applicable to various distribution points that were found to be in effect in the trade.

Q. Why were the base schedules and the discounts and differentials set up?

A. The position of The Glidden Company as a jobber was that of attempting to earn for itself the resale margin provided in the jobbers' schedules, and the schedules were used for that purpose and to conform to the competition found in the market.

Q. Was National Lead Company then a predominant factor in the white lead-in-oil business?

A. It was.

Q. Well, when Glidden acquired Euston Lead Company in 1924, who was put in charge of it?

A. The former owner and founder of the business, Mr. Edwin Euston.

Q. When did you assume charge of the Euston Lead Company?

A. When Mr. Euston retired.

2458 Q. And when was that?

A. In 1925.

Q. Did you, yourself, have any prior experience in the white lead business?

A. No, I was entirely without experience in the business.

Q. Well, how did you find the business?

A. I found that the business of the Euston Lead Company had been in general an unprofitable business, largely because the product was inferior in quality and Mr. Euston had either failed or been unable to develop any substantial distribution. He depended upon price-cutting methods in order to secure orders.

Q. Well, did Mr. Euston give you any pointers when you took over this business?

A. Yes, he gave me many ideas that he had about how the business should be operated, both from a manufacturing and from a sales point of view, and about the purchases of raw materials, pig lead and so on.

Q. Well, what were they?

A. The principal thing that he pointed out to me in my recollection, was the importance of watching the pig lead market and of keeping purchases of pig lead closely related to sales of white lead.

Q. Well, did you, as a result of that pointer, do anything yourself to determine whether or not the pig lead
2459 market was a governing factor?

A. Yes, I started watching the market daily, and I kept a daily record of the market on pig lead, the market on white lead, and on white lead-in-oil.

Mr. Duncan: I ask that this be marked for identification as Respondents' Exhibit No. 141.

(The paper referred to was marked Respondents' Exhibit 141 for identification.)

By Mr. Duncan:

Q. I will hand you, Mr. Sprague what has been marked Respondents' Exhibit 141, and ask you to identify this, if you will?

A. This is the original of a chart that I kept, covering the period from 1922 on, until I discontinued it sometime in 1929, and it is the daily record to which I previously referred.

Q. The exhibit is the result of your own checking, is that right?

A. Yes, I kept this chart and made it myself.

Q. You started to mark the chart, did you, in 1925 when you were in charge of the Euston Lead?

A. Yes, at the time I assumed charge of the Euston Lead Company in 1925.

Q. Yet I notice that the chart starts at 1922. Did you go back for 3 years, is that the answer?

A. Yes, when I started to keep the daily record
2460 myself, I changed the method that had been employed by Mr. Euston, who kept his record in a series of books, and I started to keep it in the form of a chart or graph, and in order to have a background I checked up and

worked it back to the beginning of 1922. That is the reason the chart begins in the year 1922.

Mr. Duncan: We offer Respondents' Exhibit 141 in evidence, Your Honor, and have a photostatic copy thereof which we would like to substitute in lieu of the original.

Trial Examiner Norwood: Show it to Mr. Wright.

(Respondents' Exhibit 141 for identification shown to Mr. Wright.)

Trial Examiner Norwood: Is there any objection, Mr. Wright?

Mr. Wright: I haven't had an opportunity to examine it, Your Honor. (Examines document.)

I would like to cross-examine briefly on the identification of the document before making my objection.

Trial Examiner Norwood: You may.

Mr. Wright: Mr. Sprague, I call your attention to the typed material at the far left margin. When was that typing placed on the document, and by whom?

The Witness: It was placed on the document three or four weeks ago by my secretary in accordance with my request for her to put it down so that it would identify the source of the data.

2461 Mr. Wright: Was that in contemplation of its offer as evidence in this matter?

The Witness: Yes, sir.

Mr. Wright: I call your attention to the small dotted lines near the middle of the exhibit, in the middle of the page. Did you place those dots on there?

The Witness: Yes, those dots were placed on there in the year shown, 1925.

Mr. Wright: When was this document itself prepared, the original of this document?

The Witness: Originally I kept the chart in a series of graphs, each representing a year, and then in 1929 I stuck them together in the form in which they now appear.

Mr. Wright: Then the original of this document was prepared in the years shown on the face?

The Witness: Each yearly graph was prepared during each of the years indicated, and then they were stuck together in a continuous chart as you have it there.

Trial Examiner Norwood: What do the dotted lines represent there in the 1926 section?

The Witness: I do not recall.

Mr. Wright: What are the dotted lines to which I called

your attention, appearing in the years 1924 and 1925, the broken lines?

The Witness: I do not recall the significance of
2462 those dotted lines, in 1925 or 1926, shown on the chart.

Mr. Wright: What is the source of the figures that you used in preparing this chart?

The Witness: They were prepared or obtained principally from the quotations in the New York Journal of Commerce and from other currently available sources, but every day, every morning, I opened the New York Journal of Commerce every day and made a note of the markets that were there reported.

Mr. Wright: Does that apply to all the commodities that purport to be listed on here?

The Witness: It applies to each of the three commodities shown.

Mr. Wright: Are they currently reported, all three of those commodities, in the New York Journal of Commerce?

The Witness: They were at the time, and insofar as I know they still are.

Trial Examiner Norwood: I think the counsel should confine his voir dire questions to an explanation of what it is bearing on its admissibility. You may cross-examine him later.

Mr. Wright: Before I can perfect my objection, I would like to know some more about the source of these figures; that goes to the very heart of this question.

Mr. Duncan: I object to any further questioning
2463 along the line that Mr. Wright has been questioning, because I feel he has exhausted his voir dire inquiry as to whether or not this particular document is sufficiently identified so as to be received in evidence. I therefore object to further questioning.

Trial Examiner Norwood: You may ask him anything further so as to satisfy yourself as to how it was made, or any explanation bearing on its admissibility.

Mr. Wright: I have one more question that I would like to ask the witness along the same line.

Trial Examiner Norwood: Go ahead.

Mr. Wright: But there are other sources than the Journal of Commerce for the statistics which were graphed in here, is that correct?

The Witness: Why, yes, those statistics were published

in various places. I couldn't get them daily in any other way than the Journal of Commerce every morning when I took them.

Mr. Wright: Did those prices reflect the actual prices at which transactions of sale were made?

The Witness: They reflected the markets as shown in the New York Journal of Commerce.

Mr. Wright: Your Honor, I object to the offer of this in evidence. In the first place, as shown, there are notations and captions on it that were made very recently
2464 for the purpose of this proceeding. In the second place, there is no showing that the figures that were used in the matter are comparable. It is hearsay, it is not the best evidence of what prices were on these various commodities at that time. If Respondents wish to prove what prices were in the quotations of recognized market sources, they can bring those sources in.

Mr. Duncan: If Your Honor please, I don't know how the Commission could get better evidence than what we are trying to introduce through this exhibit. Here is an official of The Glidden Company who, from 1925 through 1929, personally charted this on a daily basis to see whether or not the pig lead market would govern the white lead-in-oil and the dry white lead markets.

Trial Examiner Norwood: This witness testified that he entered these things in from the data which he has described. I shall have to overrule the objection and receive this in evidence. The photostatic copy may be received, and the original returned.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 141, was received in evidence.)

By Mr. Duncan:

Q. Mr. Sprague, did you use this chart, now referred to as Respondents' Exhibit No. 141, in operating the Euston Lead business?

A. Yes, I found it of significant value in dis-
2465 charging my position as manager of that business.

Q. What did you find?

A. I learned from the chart a number of things that might be called the facts of life of the white lead business. In the first place, the chart showed and confirmed statements that had been made to me by Mr. Euston that the price of white lead moved responsibly up and down with

the market price of pig lead. Usually, however, with a time lag in each case. The chart illustrated that that was true. The chart also illustrated that the difference between the market price of white lead and the market price of pig lead was, over an average period of 3 or 5-year stretches, fairly constant, although there were rather extended periods when the difference was narrow and there were extended periods when the difference was wide. That fact became one of the keystones that we had to recognize in the management of that business, because it was obvious that if we were going to be able to operate the white lead business it would apparently have to be done within the margins or spread that those curves illustrated.

Those were some of the significant things that arose from and which we learned from this chart.

Q. Did you use this chart to advantage in handling pig lead purchases?

A. Yes, we did, because one of the things the chart portrayed was the trends in the pig lead market.

2466 Q. Did you watch the London lead market?

A. Yes, I watched the London lead market in the daily quotations that were available, although I did not chart the London market.

Q. What else did the chart, referred to as Respondents' Exhibit No. 141, teach you in addition to the other advantages which you have already related?

Mr. Wright: Objection. He hasn't testified that it taught him anything yet.

Trial Examiner Norwood: That is a manner of expression. I think he knows what counsel means, which is—what does it portray.

You may answer it in that sense, if counsel will adopt my language.

The Witness: What was your question?

Mr. Duncan: Will you read the question?

(The reporter read the question as follows:

"Q. What else did the chart, referred to as Respondents' Exhibit No. 141, teach you in addition to the other advantages which you have already related?")

A. One of the significant things, to me, was that by watching the chart it became possible to do some prognosticating as to the trend and the probable changes in the price of white lead. For example, over substantial periods of time I observed that the difference between the price of white lead and the market of pig lead was around 2

2467 cents per pound, and I was able to use that with a great deal of benefit at times, because obviously it indicated that whenever the difference between the pig lead market and the going white lead market became less than 2 cents a pound, that the next movement in the white lead price would be a decline; and conversely, when that difference became wider than 2 cents a pound, the next movement to be expected was an advance in the price of white lead.

By Mr. Duncan:

Q. In discovering that fact, did you consult or receive any suggestion or intimation from any of your competitors?

A. No, none.

Q. In other words, that was exclusively your own discovery from the charts?

A. It was exclusively my own deduction, and I kept very quiet about it because I thought I had something.

Mr. Duncan: Mr. Reporter, will you read the fairly long answer of the witness just preceding his last few answers?

(The reporter read the answer as follows:

"A. One of the significant things, to me, was that by watching the chart it became possible to do some prognosticating as to the trend and the probable changes in the price of white lead. For example, over substantial periods of time I observed that the difference between the price of white lead and the market of pig lead was
2468 around 2 cents per pound, and I was able to use that with a great deal of benefit at times, because obviously it indicated that whenever the difference between the pig lead market and the going white lead market became less than 2 cents a pound, that the next movement in the white lead price would be a decline; and conversely, when that difference became wider than 2 cents a pound, the next movement to be expected was an advance in the price of white lead.")

By Mr. Duncan:

Q. With respect to the answer which has just been read, do you care to change your answer?

A. I would like to correct my answer, which was obviously in the reverse. When the difference between the pig lead market and the white lead market was less than 2

cents, the next change in white lead to be expected was an advance rather than a decline, as I stated originally.

Q. Then in discovering that fact, did you consult or receive any suggestion or intimation from any of your competitors?

A. None whatever.

Q. Will you please explain the words and figures, year by year, at the bottom of the chart? I am referring to Respondents' Exhibit No. 141.

A. The figures that I wrote in each year are explained
) in this manner: The figure after the letters "Avg.
2469 Dry" is the daily average for that year of the market quotations for dry white lead. The figures after "Avg. Pig" are the daily average for that year of the pig lead market, all of these figures being in cents per pound. The figures after the words "Over Pig" are the difference between the average daily dry white lead market and the average daily pig lead market. The figure after the word "Spread" is a calculated figure comprising the difference between the average daily dry white lead market and 80% of the average daily pig lead market.

Q. Why did you select 80%?

A. That was a calculated figure which I used for my guidance in indicating to me what the spread was between the cost of lead contained in a unit quantity of white lead—

Q. (Interposing.) That is dry white lead?

A. Dry white lead. (Continuing.) —and the average market for dry white lead.

Q. Per pound, is that right?

A. Per pound.

Q. Well, what is the significance of that fact?

A. Well, I regarded that as of particular significance, because the actual cost of the lead contained in white lead on any market situation was represented by that 80% figure, since the analysis of dry white lead is approximately 80% lead.

Mr. Duncan: I will ask the reporter to mark this as Respondents' Exhibit 142.

2470 (The paper referred to was marked Respondents' Exhibit 142 for identification.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Duncan:

Q. I hand you what has been marked Respondents' Exhibit 142, and ask you what it is?

A. This is a simple graph that I had prepared, showing the approximate lead content, by analysis, of the commercial lead pigments—dry white lead (basic carbonate), litharge, red lead, and also white lead-in-oil.

Q. When you speak of lead content, do you mean metallic lead content as distinguished from white lead?

A. Yes, I refer to the amount of metallic lead that is found upon analysis of these pigments.

Mr. Duncan: We offer this exhibit, Your Honor, in evidence. We would like to substitute the photostatic copy of the exhibit for the original.

Trial Examiner Norwood: That may be done.

Mr. Wright: May I examine briefly on this?

Trial Examiner Norwood: Yes.

Mr. Wright: Did you state this was based on an
2471 analysis of commercial lead pigments, Mr. Sprague?

The Witness: Yes, the chart portrays the approximate chemical analysis of the commercial pigments.

Mr. Wright: Who made the analyses represented on this chart?

The Witness: One of the men in our office computed them from the information I gave him and the chemical formula of the pigments.

Mr. Wright: What information did you give him?

The Witness: I told him what the formula was.

Mr. Wright: In other words, you told him what the lead content was?

The Witness: No, sir, I told him what the chemical formula was, and in the case of the white lead-in-oil I told him what the average amount of white lead and turpentine was in commercial white lead-in-oil.

Mr. Wright: In other words, it wasn't based on an actual analysis chemically of products which were on the market?

The Witness: Yes, sir, it was based on an actual chemical analysis of the various products.

Mr. Wright: Who made that analysis?

The Witness: Well, any chemist can calculate the analytical composition of a substance whose formula he has, from the atomic and molecular weight ratios.

2472 Mr. Wright: Well, then, it was made from that

sort of calculation rather than a chemical analysis of a physical substance?

The Witness: Yes, the chemical analysis of the physical substance is found to exactly duplicate the results shown from the chemical formula.

Mr. Wright: Then you gave him a formula which you considered was the formula of the commercial pigments on the market, and he made that calculation from that; is that correct?

The Witness: We regarded as typical of the commercial pigments on the market, white lead as the basic lead carbonate; litharge as Pbo lead oxide; and red lead as the higher oxide, Pb_3O_4; and calculated the lead content from that.

Mr. Wright: As to the red lead, what grade of red lead was it that you gave him the formula for?

The Witness: The standard grade of red lead, Pb_3O_4. We used that as typical because of the various grades of red leads, the variance in the lead content is very slight.

Mr. Wright: What is that grade known as commercially? Is that the 95%?

The Witness: Yes, the 95% standard red lead.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

2473 Mr. Wright: What figures did you give him as to white lead-in-oil for purposes of this calculation?

The Witness: For purposes of the calculation, I gave him the composition of the stiff paste grade of white lead-in-oil, which is approximately 8% oil and 92% white lead.

Mr. Wright: That is basic carbonate?

The Witness: Yes. From that the lead content was computed. You will note that the chart is headed "Approximate", which was for the purpose of allowing for the very slight variations that may exist in various commercial grades.

Mr. Wright: In other words, then, this doesn't represent an exact percentage of any particular commercial product that is on the market?

The Witness: Exact to within 1 or 2 percent.

Mr. Wright: I have no objection to this exhibit.

Trial Examiner Norwood: Received.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 142, was received in evidence.)

2474 By Mr. Duncan:

Q. Mr. Sprague, what are the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?

Mr. Wright: Objection, Your Honor. There has been no time element stated there and it is obviously impossible to answer it by a general statement.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. Sprague, what are the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?")

Trial Examiner Norwood: Do you want to fix a time when that formula prevailed?

Mr. Duncan: I will try to give a time if Your Honor wants the time element in there. I thought it was timeless.

Mr. Wright: Otherwise it calls for a conclusion on the part of the witness. It hasn't been established that these things bear any stable relation.

By Mr. Duncan:

Q. For example, in 1942 what were the relative percentages, approximately, of pig lead as a cost element in white lead products and lead oxide products?

A. In 1942, or at any other time—it makes no difference—the preponderating cost element in these prod-

2475 ucts is the cost of pig lead.

Q. Does the oxygen or the carbon amount to much?

A. It is inconsequential.

Q. Does the white lead—and when you have referred to white lead I assume you have meant dry lead during the entire examination this morning—

A. When I refer to white lead I refer to dry white lead.

Q. Now does that white lead contain approximately 80 per cent lead?

A. Yes, sir.

Q. And do the lead oxides contain approximately 90 per cent of lead?

A. Ninety per cent or higher.

Q. Are you speaking of percentages or by weight?

A. Percentage by weight.

Q. How does that bear on the relation of cost of lead to cost of the pigment?

A. The cost of lead used in manufacturing any of the lead pigments is the dominating cost element in preparing it.

Trial Examiner Norwood: He wants to know how would the percentage by weight compare with the percentage of cost—isn't that right?

Mr. Duncan: Precisely.

The Witness: The percentage of lead by weight contained in the lead pigments would be close to the
2476 percentage of the cost of the lead pigment at any given time.

Mr. Wright: Objection, Your Honor. That is very vague. It hasn't been stated what pigment is referred to in the answer, and I move it be stricken.

Trial Examiner Norwood: The motion is denied. You can examine him and render this thing more definite.

By Mr. Duncan:

Q. When you referred to "cost" in answering that last question, did you refer to material cost?

A. No, I referred to the manufactured cost.

Q. Well, is the cost at any given time correspondingly preponderant in the cost of the finished product?

A. It is always preponderant.

Q. Have you prepared a study showing the pig lead market averaged over longer periods beyond the 1929 period that was referred to in the chart, Respondents' Exhibit 141?

A. Yes, sir.

Mr. Duncan: I will ask the reporter to mark this as Respondents' Exhibit 143 for identification.

(The chart referred to was marked Respondents' Exhibit 143 for identification.)

By Mr. Duncan:

Q. I will hand you what has been marked as Respondents' Exhibit 143 for identification and ask you what it is, Mr. Sprague?

2477 A. This is a chart or graph showing the monthly average New York pig lead market, the monthly average dry white lead market at New York, and the monthly average card price for white lead-in-oil. It is a chart similar to the one that I prepared earlier, but instead of being a daily record it is a monthly average record, beginning the latter part of 1929 and extending through 1944.

Q. Was that chart prepared under your supervision and control?

A. Under my supervision and at my direction, yes.

Mr. Duncan: We offer in evidence, Your Honor, Respondents' Exhibit No. 143.

Mr. Wright: Mr. Sprague, when was this document prepared?

The Witness: My recollection is that it was prepared in 1945.

Mr. Wright: And the sources of the information are those listed at the bottom of the document, are they?

The Witness: Yes, sir.

Mr. Wright: In other words, the top line on the chart was compiled from data published in the American Paint Journal, issues of October 26 1938 and of October 31, 1944, is that correct?

The Witness: If that is what the chart states it is correct.

2478 Mr. Wright: Will you tell us the process of compiling this; what was done in compiling this chart?

The Witness: The chart was plotted from the data that was shown in the American Paint Journals referred to there.

Mr. Wright: And would your answer be the same with respect to the lines on the graph marked B and C?

The Witness: No, my answer would correspond exactly to what is shown on that graph. My recollection is that the pig lead market shown there was not obtained from the American Paint Journal.

Mr. Wright: You state that these are monthly average prices as they appeared in those publications?

The Witness: Yes, sir, they are.

Mr. Wright: Do you know from what sources those publications listed secured that information, or how they compiled that monthly average that they published?

The Witness: I did not inquire from these journals what their source practices were. I simply used the data that have been generally recognized in the trade as being correctly portrayed by these publications.

Trial Examiner Norwood: Did the publications give the monthly averages or did you figure out the monthly averages from data given in the publications?

The Witness: The publications published these 2479 charts showing the monthly average. There was no

calculation done by me in any way in connection with the chart.

Mr. Wright: Your Honor, I object to the reception of this document in evidence. It is obviously hearsay; it was prepared by an organization and there is nothing in the record about the sources of those statistics or how they arrived at the averages, or where they got them. It is plain that this witness prepared this chart from those sources in contemplation of this proceeding. The figures are not shown to be in any way reliable and I am deprived of any right of cross-examination as to the source of those figures.

Mr. Duncan: If Your Honor please—

Mr. Wright: (Interposing.) It is incompetent as proof of the matters for which it is offered. Certainly the American Paint Journal can't be used through this witness to prove what the prices of these various products were on any average basis in this manner. These respondents were engaged in the business of marketing all three of these products; they are obviously in possession of much better facts and figures as to the prices of these articles than some third party that is not in any way connected with this proceeding.

Mr. Duncan: Your Honor, I submit that this chart is admissible. It is a continuation of the first chart, Respondents' Exhibit No. 141. Now this Commission, I do believe,
wants the entire picture. We have tried to trace this
2480 chronologically. We started off in 1922 and that
chart stopped at 1929. Now this picks it up in 1930, true on a monthly basis rather than daily, but it carries it right up to 1944. I submit that it would be very unfair if this document were not received in evidence for what it is worth.

Mr. Wright: Your Honor, counsel has characterized this as a continuation of Respondents' Exhibit 141, but it is obvious on its face that it is not. I assume that Your Honor when he admitted Respondents' Exhibit 141 did so perhaps as an exception to the hearsay rule on the basis of entries kept in the regular course of business by this man in connection with his official duties. This document, on the other hand, is something which was plucked out of a publication about which we have heard nothing before in this proceeding, and it is on a monthly average basis. There is no testimony as to how that average was compiled or from where the figures were obtained.

Trial Examiner Norwood: Well, I think there is a distinction between this and the other chart, but it has long been accepted as good practice to receive daily records from newspapers and periodicals showing fluctuations in the market price. Now this is removed from that because this is a tabulation of what this witness says those records showed. Our custom in receiving material of this kind is to condition its receipt on the data on which it is
2481 based being made available to the other side. If this data is available we can receive this for our convenience and counsel in support of the allegations of the complaint may then offer that in evidence if he wants to; he is privileged to do so if it isn't a true reflection of what those market quotations were. That has been our practice here and it is the practice in other governmental agencies to follow that principle of administrative procedure. I will ask counsel if that data is available?

Mr. Duncan: I will have to ask the witness that because I don't know. Are the data on which this is based available?

The Witness: The data are available and have been regularly published and the graphs charted from it adequately portray the trends of the market involved.

Mr. Duncan: We offer the exhibit in evidence, Your Honor.

Trial Examiner Norwood: That data is accessible to the Commission, I believe.

Mr. Wright: If this were an offer of the original data that would be something else, but even in that event I don't think it could properly be offered through this witness.

Trial Examiner Norwood: I think so.

Mr. Wright: There is absolutely nothing available to us on the source of this information. It is not market quotations; it is some third party's idea of what the
2482 average of market quotations was.

Trial Examiner Norwood: It is taken from the figures, he says, and he has testified when; it is taken from these trade-journals and from the market information that is regularly recorded in those journals, and I think copies of them are available and the Commission could find out whether this is a true reflection of that material; and I think it is sufficiently reliable to come in for consideration, at least.

Mr. Wright: Well, Your Honor, I don't think I should

have the burden of calling the publisher of some document, some journal. That burden properly is on the respondents to establish the authenticity of this as a source of information and to bring in the original information. Here an attempt is being made to prove the market prices of the products which this witness sells.

Trial Examiner Norwood: This is something we are going to have to go into anyway, and we are going to have to get exact data on it, and I don't think it is going to prejudice anybody to receive this, so as to have something to start from, and then to go on. It is just a practical way of looking at it to start this study. It is not going to be taken as the final word here. It is received in evidence for whatever probative value it may have.

Mr. Wright: Well obviously, Your Honor, on the
2483 face of it, it has no probative value.

Mr. Duncan: Of course we take exception to that statement of counsel. We think it has a lot of probative value.

Trial Examiner Norwood: We will hear from counsel in support of the allegations of the complaint if these are incorrect in any way. The objection is overruled and the document is received, subject to the data on which it is based being available. If that is not available and cannot be obtained I will entertain a motion to strike the exhibit from the record. In this case also, a photostatic copy may be substituted for the original.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 143, was received in evidence.)

By Mr. Duncan:

Q. Mr. Sprague, from the standpoint of your sales and sales policies respecting white lead, what is the significant fact shown by Respondents' Exhibit 143, the monthly graph, which has just been received in evidence?

A. This chart portrays the relationship between the pig lead and the white lead and the white lead-in-oil markets, and from it the same conclusions may be drawn regarding those relationships and their significance that are obvious from the first daily chart that I kept myself.

Q. The chart received as Respondents' Exhibit 141?

2484 A. Yes. Respondents' Exhibit 143 shows that the same significant relationships maintained themselves

through these years 1929 to 1944 as were shown in the years 1922 to 1929, and they were capable of the same uses as the first chart.

Q. Now to go back to what you call the "first chart", which we know as Respondents' Exhibit 141, did you actually use that chart in connection with your conduct of the business of the Euston Lead Division on behalf of the Glidden Company?

A. It was used constantly.

Q. By whom?

A. By myself.

Q. Will you describe more fully to what use you put Respondents' Exhibit No. 141?

A. Well, I have described a number of the uses and the significant things which it taught me. One of the significant things was that if I expected to be able to earn the same average gross profit in my white lead business as was earned by the market leader, I would have to adjust my prices of dry white lead up and down as rapidly as the market moved up and down. Obviously, the gross margin obtainable in the business is roughly measurable by these spreads between the two graphs. It showed me that if I cut under one I simply cut into my possible gross margin.

Q. Referring to Respondents' Exhibit 141 there appears on the chart the legend "E & M J". Will you
2485 explain what you meant by that?

A. Yes. For the purpose of checking myself in my computation of the daily average pig lead market, I recorded, during certain of these years, what that average was as it was reported by the Engineering & Mining Journal.

Q. And will you tell us what significance that has?

A. Well, it had these significant points. First, I wanted to see how comparable my calculation was, and then it was particularly interesting because in the years prior to 1925 I had found that Mr. Euston had purchased all of his pig lead on an average market price contract governed by the E. & M. J. average, and that then showed me what his average cost of pig lead had been in the years prior to 1925, and it was interesting to me to see for a year or two, I forget how many years it was continued—no, I guess it was not continued beyond 1925 because we ceased at that time to secure our pig lead on that kind of a contract.

Q. Had Mr. Euston suggested that you might be able to beat the lead market?

A. Mr. Euston warned me not to try it.

Q. What were the results of your efforts to beat the lead market?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: The objection is overruled.

Mr. Wright: It hasn't been established that he
2486 did try to beat the lead market; counsel is leading the witness.

Mr. Duncan: I will withdraw the question.

By Mr. Duncan:

Q. Did you follow Mr. Euston's suggestion?

A. No; like all newcomers we had to learn by experience.

Q. And what did experience teach you?

A. Our experience was very unsatisfactory in efforts to try to outguess the lead market.

Q. In addition to the daily markets being indicated by Respondents' Exhibit 141, which showed you the underlying trends up and down, did the chart prove to be of any value in the timing of your purchases of pig lead?

A. Yes, it did.

Q. And did you constantly use that chart for that purpose, among others?

Mr. Wright: Objection, Your Honor.

Mr. Duncan: I think this goes to the practice—

Trial Examiner Norwood: (Interposing.) He has given us that information before anyway; objection sustained.

Mr. Duncan: I will withdraw the question and put it this way.

By Mr. Duncan:

Q. Why did you stop keeping the daily chart record in 1929?

A. I left my immediate work and residence at the Euston Lead Company in Scranton at that time, and
2487 I ceased keeping the daily chart.

Q. Did you follow, however, the averages as published in various sources?

A. Yes, I did. I thought I had learned pretty much the lessons that the chart had taught me and I watched the lead market daily, but I did not chart it down daily.

Q. You stated earlier that in order to conduct the white lead business profitably you would have to do it either

within the spreads shown on your chart, or else by being successful in producing a product far superior to National Lead's Dutch Boy so that it could be sold at a premium over National Lead Company's market, or be successful in finding out how to consistently purchase pig lead at below the average New York market. Did you endeavor to accomplish these results?

Mr. Wright: May I have the first part of that question read, please?

(The reporter read the portion of the question requested as follows:

"Q. You stated earlier that in order to conduct the white lead business profitably you would have to do it either within the spreads shown on your chart" etc.)

Mr. Wright: That is sufficient. Objection, Your Honor. That is putting words and conclusions in the mouth of the witness which his testimony doesn't warrant. It is in
2488 the form of a leading question.

Trial Examiner Norwood: I am inclined to think that it is pretty leading.

Mr. Wright: There was no such statement about the National Lead Company in the testimony of this witness, I don't believe.

Trial Examiner Norwood: I will sustain the objection. We will take a three-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed, Mr. Duncan.

By Mr. Duncan:

Q. Mr. Sprague, what results did you try to accomplish when you were in charge of the Euston Lead Division of The Glidden Company?

A. Well, I tried to bring the business into a profitable position and it was obvious that this could be done in various ways. One of them would be to be able to purchase pig lead at an advantage by outguessing the market. Another would be to make a better product, sufficiently better so as to enable it to be sold in the market at a premium. If either one or both of those could be accomplished it would be possible to operate at a better profit margin than the market averages shown by the charts.

Q. Did you try to do both of those?

Mr. Wright: I object to that as irrelevant and im-
2489 material.

Mr. Duncan: I think it has relevancy.

Trial Examiner Norwood: Objection overruled.

The Witness: We tried very hard to do both of those things.

By Mr. Duncan:

Q. Did Euston Lead have any advantage in cost of manufacture?

A. We regarded our process of making white lead as one that was more economical than those usually employed.

Q. Well, was it of any consequence?

A. No. The manufacturing cost, according to our experience, of white lead, was such a minor factor in the total cost of the finished white lead that an advantage in the manufacturing process cost itself was inconsequential.

Q. Between 1924 and 1929 did Euston Lead develop and improve its product?

A. Our constant endeavor was to improve the quality of Euston white lead, and we succeeded in making improvements and in realizing those improvements irregularly all through the years. By 1929 there had been substantial improvement realized in the quality of the product.

Q. Was there any change in its color?

A. Yes, the improvement consisted of an improvement in the color or the whiteness of the product, which was of importance in the white pigment.

2490 Q. Who were Euston's customers on white lead-in-oil during that period of development and improvement?

A. On white lead-in-oil the sales were made principally to public purchasing agencies on bids, and I recollect to a few important industrial buyers of white lead-in-oil. Those sales were made always at cut prices, or rather at prices below the market for white-lead-in-oil because of the necessity to recognize the questionable quality of the merchandise.

Q. Well eventually did you depend on fortuitous pig lead purchases in order to make a profit in the white lead and white lead-in-oil business?

A. We depended upon our skill in that for a while but we had to abandon it because our skill didn't produce results. We couldn't successfully beat the market.

Q. Were you able to get a product better than National Lead's so that you could sell at a premium, and by "you" I mean the Euston Lead Division of The Glidden Company?

A. We thought we had attained a product that was superior to that of National Lead or other suppliers—

Q. (Interposing.) When did you think you had achieved that?

A. My recollection is that we thought we had done that about 1939.

Q. '39 or '29?

A. '39.

Q. Well, back along about 1929 did you have oc-
2491 casion to develop sales?

A. After we had made our first substantial improvements in the product during the period between 1925 and 1929, we thought we had gotten something that was good enough to compete with the market leader, Dutch Boy White Lead-in-Oil, and we undertook then, with hopes of success, to develop a distribution and a business on it.

Q. Well, what methods did you employ?

A. We employed about every method that could be conceived of as a means of accomplishing that result. The first method which we stressed was to attempt to interest the paint divisions of The Glidden Company in aggressively taking hold of the sale of white lead-in-oil, which we merchandised under the trade name of Euston White Lead-in-Oil.

Q. Was that successful?

A. We tried for some time to arouse successful results but we failed in doing so.

Q. For about how long a time was it that the Euston White Lead-in-Oil was sold by the paint divisions of The Glidden Company?

A. I will have to refer to some notes that I have, if I may, in that connection.

Trial Examiner Norwood: What are those notes to which you are referring?

The Witness: These are some notes that I pre-
2492 pared of some points that I wanted to bring out in my testimony.

Mr. Wright: When were they prepared, Mr. Sprague?

The Witness: These notes were prepared yesterday.

Mr. Wright: From what sources were they prepared?

The Witness: These are notes that arose from quite a long period of time, to bring together my recollection and that of others with respect to the various matters that occurred during these years.

Mr. Wright: Do they include matters that were the recollection of others than yourself?

The Witness: They are the result of many discussions that I have had with others who were identified in one phase or another with these activities.

Mr. Wright: In other words, those notes contain information which yu secured recently from others in the organization?

The Witness: No.

Mr. Duncan: I object to that.

Mr. Hinds: I object to having the examination interrupted by this cross-examination. The witness is obviously permitted to refer to anything that will refresh his recollection, including a telephone book if that would serve his purpose, and if is improper cross-examination at this time.

Trial Examiner Norwood: It isn't cross-examination at all. He is asking a few questions on voir dire cov-
2493 ering this material which the witness is using to refresh his memory. It occurs to me that it is such a document as may be used, so I think we may proceed. When you made those notes you knew them to be true, did you?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Duncan:

Q. About how many years did The Glidden Company, through its sales division, attempt to sell Euston White Lead-in-Oil?

A. This first effort that I attempted to get The Glidden Paint divisions to undertake extended over a period of four or five years.

Q. Can you tell us why that was unsuccessful?

A. Yes, it was unsuccessful for a couple of fundamental reasons. The first one was that I was desirous of showing a profit in the Euston Lead Division, and my argument with the paint people was that they ought to be willing and able to build a sales distribution of Euston White Lead-in-Oil, functioning as a jobber, purchasing the white lead-in-oil, so to speak, from the producing plant on a jobbing basis, and operating on the jobber's margin. The objection to that was that the paint people didn't have enough of a margin to pay the kind of commissions to the sales force that they could afford to pay and did pay on the sales of other types of paint products. But the real difficulty was that the

2494 sale of white lead-in-oil by a paint organization was asking them to pull in both directions at the same time. They had no enthusiasm for selling white lead-in-oil, and none could be inculcated by the sort of incentive that was provided. The paint salesman reported that his job was to sell ready-mixed paint in competition with white lead-in-oil, or sell white lead-in-oil in competition with ready-mixed paint, and he didn't know how he was going to do both at the same time—and the effort failed for that fundamental reason.

Q. What was the pricing policy followed by the paint divisions over such sales as they were able to make?

A. The pricing policy at that time was that the paint divisions priced the white lead-in-oil at a concession of one-half cent per pound under the competitive market schedules and selling bases of the Dutch Boy White Lead-in-Oil.

Q. Now will you tell us what other method Euston Lead Division employed with respect to the sale of Euston White Lead-in-Oil?

A. Another method that we tried was to see if it could be accomplished by a direct mail selling policy.

Q. To whom?

A. By a direct mail presentation to large painters, painting contractors, distributors and important dealers.

Q. What result did you get from that?

2495 A. The results from that effort were entirely unsatisfactory although at first there did seem to be some sizeable response, but it petered out and washed up.

Q. Did you apply any other methods on behalf of Euston?

A. Yes, sir, we made an extensive plan of bringing our Euston White Lead-in-Oil to the attention of buyers by direct sales methods, by the employment of salesmen who were to devote their time and attention in an endeavor to build the business. We couldn't afford to hire a lot of salesmen but we selected those territories where we thought the cream of the white lead-in-oil business would be found, and we provided the salesmen with promotional matter and with sales support, and furned them loose in the hopes that they could make the thing go by that method.

Q. Why did you think you could sell at Dutch Boy prices?

A. We tried on more than one occasion to bring our price level to that of the Dutch Boy White Lead-in-Oil.

During the time that this was done with our own direct salesmen we did it because we had made further improvements in the product, and we thought we were about to the place where we might expect on a quality basis, to be able to compete on a price equality basis with them.

Q. Did you attempt to prove the improvement to the trade?

A. Oh yes, we provided the salesmen with demonstration panels and celluloid exhibits that were designed to portray the color advantage of the product, and in-
2496 structed them in testing methods, making comparative tests with competitive white lead-in-oil, designed to show what we thought the advantage was.

Q. What was the result of the direct presentation program?

A. We were obliged to abandon it for the simple reason that the cost was prohibitive and the results were too long in coming. Our competition was just too good for us.

Q. Did you consider any other method?

A. Yes, we did. We again thought that we might be able to put the merchandise across by having it handled through the Glidden Paint divisions, and setting up a different basis for doing it. There were other methods employed among which I can remember that we attempted to locate large buyers of white lead-in-oil with the intent of using the method of making an attractive price to secure tonnage in isolated spots, that would justify the price, and would enable a backlog of volume to be obtained.

Q. What happened to that?

A. That idea was found to be not feasible at the time we tried it because the distribution pattern of white lead-in-oil had apparently changed from what it had been in some of the earlier years because we couldn't find any substantial volume of white lead-in-oil business in any one spot. White lead-in-oil is a maintenance item and a large volume does'nt exist in one spot as far as actual consumption
2497 of white lead-in-oil is concerned. We couldn't dent the large distributors who were handling white lead-in-oil because our competition was too strong for us. We had to abandon the idea that we could build volume by finding a dozen or more spots where there was large volume and making a price to get it.

Trial Examiner Norwood: We will now recess for lunch until 1:00 o'clock, Eastern Standard Time.

(Whereupon, at 11:25 a.m., E. S. T., a recess was taken until 1:00 p. m., E. S. T., this day.)

2498 Afternoon Session.

2:00 p.m. E. S. T.

Trial Examiner Norwood: The hearing will come to order. Proceed, Mr. Duncan.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Duncan.

Q. Mr. Sprague, did Euston Lead try any other methods?

A. Do you refer now to the sale of white lead-in-oil?

Q. Yes.

A. I explained a number of methods that were employed. One thing I did not describe was the program we tried of buttressing the efforts of directly employed salesmen by authorizing the holding and putting on of a series of painter meetings, where we would invite painters to a meeting place in the evening and entertain them and put on a demonstration of the qualities and properties of our white lead-in-oil. The men thought that since that method apparently had been so successfully employed by their competitors, and since they had a product that was better than it had been in the past, that that method ought to be employed to demonstrate it, and that was employed.

Q. And what results did that method have?

2499 A. Well, the result was that while it had a modicum of effectiveness, the cost of it and the results from it, again, were such that we couldn't afford to continue it. The trade acceptance of the Dutch Boy brand was not to be overcome quickly by those methods.

Q. And it was National Lead that had as its product the Dutch Boy White Lead?

A. Yes, that was the trade name of the National Lead Company which had been developed by a long period of years of advertising and promotion. It was extremely well regarded and the product was satisfactory, and the National Lead Company had the cream of the distribution of white lead-in-oil in terms of the dealers and distributors that were the better ones.

Q. Why did National Lead have this advantage? Can you assign any reasons as to why National Lead had this advantage?

A. Yes. We found that it sprang from the fact that they had, through the years, secured consumer acceptance, painter acceptance, to a remarkable and extraordinary degree. The acceptance of Dutch Boy White Lead as an article of quality was a matter of painter feeling that had been handed down from grandfather to grandson, and the consumer acceptance, or the painter acceptance was one of the main factors.

Another factor was that the Dutch Boy product was backed up by excellent service in the sense that ade-
2500 quate stocks were available and there was good distribution. Any time a painter wanted to get a keg of Dutch Boy White Lead he could go to his nearest dealer, as a rule, and get it.

Another factor, which was a fundamental one, was that the multiple producing points of the National Lead Company and their facilities for production were at all times adequate to satisfy the entire market demand for white lead-in-oil. In other words, no one needed to wait a while to get Dutch Boy White Lead, it was always available.

As I recall it those three basic factors were wherein the strength of the Dutch Boy product lay, and where the tough bucking of competition had to be faced.

Q. Now after all these efforts, what did you conclude that Euston would have to do?

A. It was obvious to us that our methods had not been successful and in studying the situation and studying our experiences it seemed to us that there were several fundamental factors that had to come into play if we were ever going to get a reasonable distribution of Euston White Lead-in-Oil.

Q. What were those basic factors?

Mr. Wright: Your Honor, I would like to object to this whole line of testimony. I objected to it earlier on the ground that it was irrelevant.

Trial Examiner Norwood: The objection is overruled. Tell us about this competition, the nature and extent of it.

2501 The Witness: Well, the factors, as we saw them, were these. First, the price of our product could not exceed that of the market leader to any class of buyer. We were thoroughly convinced that it was hopeless to attempt

to demonstate enough superiority in quality to get any class of buyer to pay an enhanced price over the price prevailing for Dutch Boy White Lead-in-Oil. One reason for that was the nature of the superiority that we thought we had attained, namely, one of odor and hiding power in the paint made from our white lead-in-oil. Well, we did have an advantage in color and it could be demonstrated that it was there, but we found that when it got on the side of a house alongside of Dutch Boy, in a matter of four or five or six months there was no difference in color to be seen, and it was an evanescent advantage.

The question of other characteristics of the product that we thought advantageous with regard to such things as the ease of spreading and the ease of breaking up for use were really minor points that couldn't be given a dollar value.

We just found, time and again, that painters would say, "Well, maybe this is a little better but it is not worth any more money, I get the same results on the side of a house and I am not interested in any premium". That was the point that we had to accept, that it was fruitless to attempt to get a higher price at any stage of our efforts.

2502 Then the next thing that we recognized that had to be taken into account and accepted was that we certainly would have to abandon the idea of offering our merchandise to painters or consumers at a lower price than the market leader.

By Mr. Duncan:

Q. What led you to that conclusion?

A. Well, we had had by this time considerable experience in trying to sell our product at various lower prices, and we encountered a fundamental merchandising fact that an article that the consumer can't visualize and judge immediately as to its quality is injured by being offered in the market place at a cut price. It reacts against the product, injures it. We found that to be true and it was particularly true with Euston White Lead for these reasons: First, in our case such painter recollection as existed of our product that had been offered, was bad. Whatever they could remember about Euston White Lead was bad because the product wasn't up to competitive quality. Then we had to face the very special situation that resulted from the early history of the white lead-in-oil business.

Q. What was that?

A. That was reflected in this way. In the early history of the paint business in this country white lead-in-oil was the principal and the basic paint material, it was the only recognized quality white paint. And as the ready-mixed paint business developed in competition with that,
2503 there also developed the various imitation and spurious white leads that were put on the market as white lead—Green Seal White Lead, for example, or XYZ White Lead, which in too many cases turned out to be adulterated merchandise.

Q. Was that suspicion cast on Euston's product?

A. That suspicion was cast upon Euston White Lead-in-Oil as well as any other white lead-in-oil that was exposed to the painter at a cut price. It lingered in their minds, these experiences in the past that they had had with low-priced white leads which were adulterated and inferior. Those things combined to convince us that we never were going to get anywhere with cut prices to the consumer and the painter.

Q. Did you ever attempt to overcome that situation, that is to overcome this suspicion that had been cast on your product?

A. We tried every method within reason that we could think of. At one time we advertised and we put on our kegs that we would pay one hundred dollars in gold to anybody that could prove that there was anything in one of those kegs except pure white lead and pure linseed oil.

Q. Did you ever have to make good on that guarantee?

A. No, we never did because our product was pure. We later placed on our kegs, and it is my recollection that we still do, a metal tab to the effect that it is guaranteed to be pure white lead, pure linseed oil and nothing else, in
2504 the case of the stiff paste grade; and in the case of the soft paste grade, nothing but pure linseed oil, pure turpentine and pure white lead.

Q. Did you apply a test known as the blow-torch test?

A. Yes, we gave our sales people, and we told our distributors and dealers to apply the blow-torch test to our white lead-in-oil for the purpose of proving its purity.

Q. Now you spoke of these basic factors and you have given us two of them, I think. What is a third basic factor which you found must govern a program for the successful sale of Euston White Lead-in-Oil?

A. The third factor was that we would have to get the

sale of our white lead-in-oil into the hands of a sales organization who could handle it along with other items so that the sales expense that could be charged against the white lead-in-oil would be low.

Q. Why did you have to keep your sales cost so low?

A. Well, we were compelled to keep our sales expense low because in the first place we had a plant whose volume was limited and our job was to produce a profit within the scope of the volume of production attainable. Secondly, and more importantly, we learned from our chart of relationships between the price of white lead-in-oil less the discounts applicable, and the cost of pig lead, that it was more or less constant and that it was more or less
2505 narrow. So if we were going to undertake a sales program that gave us a high cost per unit of white lead-in-oil sold, the only result would be to subtract too much from the attainable margin. We always had to operate in between the ceiling and the floor, the ceiling of the National Lead Company and the floor of the pig lead market. Now, if we increased our sales expense too high, or conversely, if we dropped our competitive price too low, we squeezed the life out of ourselves, and we couldn't live that way.

So I decided, and I convinced The Glidden Company, that we were not going to get the Euston White Lead-in-Oil marketed unless we could do it at a low unit sales cost, and I proposed a scheme by which it could be done.

Q. What was your scheme, and how did it result?

A. My scheme was that the paint sales divisions of the company take over the responsibility for the sale and distribution of Euston White Lead-in-Oil in those markets where the largest volume lay, namely, in sales to painters and painter-contractors and distributors and dealers, and where the sales cost was high. Now economically that was practical from The Glidden Company's point of view, because each year the company has grown, the sales organization has increased in numbers, and the intensity of its coverage of prospective white lead-in-oil users was enlarged, and the only thing that was necessary was to be able to realize some enthusiasm on the part of that
2506 organization to take over the sale of the product.

Q. About when did the paint divisions of The Glidden Company take over the sale of the Euston White Lead-in-Oil?

A. My recollection is that it was in 1933 or 1932.

Q. Was that change in policy the result of action taken by the management of The Glidden Company?

A. Oh yes; the people in charge of our paint business were no more interested in doing a bang-up job of white-lead-in-oil distribution then than they had been before, and for the same reasons, and I proposed that we overcome one of the reasons by making it more profitable to the paint divisions to undertake it, and that was done by turning over the white lead-in-oil business or rather product by the Euston Producing Division of the company, to the Paint Sales Divisions at actual cost, so that they earned the entire gross margin that existed in the business.

Q. Well, did the attitude of the paint divisions of Glidden change as a result of this policy?

A. No, it didn't. The fundamentals were still there. The sale of white lead-in-oil was in opposition to the sale of ready-mixed paint, and it was a fundamental difference.

Q. Did The Glidden Company, in furthering its policy, take any other mandatory steps with regard to the sale of white lead-in-oil through its paint divisions?

A. Yes, it took every step that would be within 2507 the practical power of management. First it made it mandatory that the company stop handling Dutch Boy lead or Eagle-Picher lead or any other kind that they had been distributing as jobbers. Then they went further and set up a quota for every salesman in the paint divisions every month, of white lead-in-oil business that he was to produce.

Q. Are you familiar with the pricing practices of the paint divisions of Glidden in carrying out these activities?

A. Yes, I am in general familiar with the pricing policies although I was not in charge of them.

Q. What was the pricing practice used in the sale of white lead-in-oil at this time, that is the selling price basis—

A. (Interposing.) I will have to check up on that and see. At the beginning of that period of what I will call mandatory distribution, the pricing was on the basis of the Dutch Boy schedules as we knew them, less a concession to the dealer or the distributor of a half a cent a pound, with the encouragement and desire of the company that the dealer maintain the market price to his painter and the painter-contractor customers, so that he would have the benefit of that additional margin to justify him for sales efforts of his own.

2508 Q. What was the practice with regard to prices charged for delivery at distant points?

A. Well, there were added premiums to the base schedules for deliveries at distant points, either related to equalization points that were in existence on the part of competition, or whatever competitive prices at those points were found.

Q. Were price cards or price lists used?

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Duncan:

Q. The last question I asked was: Were price cards or price lists used? I didn't hear the answer.

A. Yes, the use of price cards, according to my recollection, was started at the time that Glidden took over—that the Glidden Paint Divisions took over that responsibility.

Q. Over how wide an area was it endeavored to secure distribution of Euston white lead-in-oil?

A. We didn't know how wide an area would be required ultimately to result in the volume of sales that the white lead plant could handle. So white lead-in-oil was put into the hands of all of the Glidden Paint Divisions' sales organization at all parts of the country other than on the Coast.

Q. Will you state whether or not Euston followed National Lead Company's prices and differentials?

2509 A. I think I answered that a minute ago.

Q. Well, if you did, then why did—

Trial Examiner Norwood: (Interposing.) Let him answer the question.

Mr. Duncan: The Examiner says he wants you to answer the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you state whether or not Euston followed National Lead Company's prices and differentials?")

A. The pricing policy for the Euston white lead-in-oil and the prices made were similar to those of the National Lead Company with allowance for the deduction of a half a cent per pound to the dealer or distributor, which I referred to.

By Mr. Duncan:

Q. Why were National Lead's prices and differentials followed?

A. Because, for the reasons that have been mentioned, the Dutch Boy product of the National Lead Company was the market leader, we couldn't sell our merchandise at higher prices and we were unwilling to sell it, insofar as we could control it, to the painter and the consumer at lower prices, and we had to operate within the range of margins that existed between our pig lead cost and our white lead price; and we also were confronted, for the first time, with the fact that Euston white lead-in-oil was
2510 in the hands of a nation-wide sales organization. That made it necessary to price the material as carefully and as accurately as we could learn what the competition was in these various parts of the country.

Q. How were the price schedules of the National Lead Company obtained?

A. Well, it was easy to obtain the National Lead Company's price schedule, because it was their practice to mail out cards to the trade, the prices and the changes were published in the newspapers, in trade journals, and more importantly, the sales reports from salesmen contacting the trade, those things combined to enable a quick and close knowledge of the market to be obtained; and that, in connection with watching the trend of our chart, enabled me to keep, from my point of view, pretty well abreast of developments.

Q. Were continued efforts made to further improve the quality of Euston white lead-in-oil?

A. Yes, we constantly strove, throughout the entire period of our operation of the business, to do that.

Q. And what effect did that have on the current pricing policy?

A. Well, the farther we could effect improvements, the stronger became our feeling that we could either eliminate or reduce the price advantage that we had given to our dealer or distributor. In other words, if we could
2511 reduce the sales resistance on the part of the painter, we could reasonably ask our distributor to handle our white lead on the same margin as he could afford to handle the market leader.

By Mr. Hinds:

Q. Were there any selling practices that you found employed by National that you were unwilling to meet?

A. Yes, we were quite unwilling to—although we had to —meet some of the price declines at various times, when our own lead position was quite adverse and we suffered.

Another thing that we were unwilling to meet was the consignment setup that was put into effect by Dutch Boy, by National Lead, and also by Eagle-Picher.

Q. About when?

A. That I will have to refer to my notes to get about what that date is.

Q. Can you answer that without referring to your notes?

A. Not on an approximate date.

Q. Then please do so, if that will refresh your recollection as to when National and any other company put into effect the consignment plan.

A. About 1934.

Q. Did you learn of any change in competitive practices with respect to quantity discounts?

A. Oh, yes, we would hear reports from the trade here and there about different discounts given for different
2512 quantities purchased at one time, or by different classes of purchasers.

Q. How did you get that information?

A. From the same type of source as I described before in connection with base price schedules.

Q. What did you do about it?

A. When we found changes and those matters had been made by the National Lead Company, we met them as promptly as we could be certain what they were. When they occurred on the part of others, we were not so fast and we held off until we actually lost business and felt something had to be done.

Q. What about quantity discounts, when you learned of any changes in those by National Lead, what did you do about that?

Mr. Wright: Your Honor, I object to these questions that refer to conclusions as to what they did about facts that aren't in evidence here. I think this sort of testimony should be brought out by specific instances that are within the witness' recollection, rather than by these broad conclusions as to what they did. Or are these questions di-

rected solely to what the policy of the company was, rather than what the company actually did?

Mr. Hinds: Both.

Trial Examiner Norwood: I think they are directed to both. Read the question.

(The reporter read the question as follows:

"Q. What about quantity discounts, when you
2513 learned of any changes in those by National Lead, what did you do about that?")

Trial Examiner Norwood: The objection is overruled.

A. We met them as quickly as we could check and determine their accuracy.

By Mr. Hinds:

Q. What other competitive sales practices did you learn of in that connection?

A. We learned of changes made at various times in respect to the premiums charged over the base schedules for deliveries at distant points. The use of equalization points was changed and premiums were charged on the basis of deliveries in various areas; and as fast as we could establish that, we met them.

Q. Why did you do that?

A. We did that because we had found in the past, in respect to equalization points, and found in respect to the areas, that our average costs of delivery in those areas were substantially higher than the premiums that competition established for those areas, and in order for us to realize the maximum gross profit from those sales that competitive conditions would permit, we had to follow them promptly.

Q. Did you become a member of the NRA Code Authority for the lead industries?

A. Yes, sir, I did.

Q. What were the circumstances which led to your
2514 being appointed, if you know?

A. Well, the lead Code provided that the Code Authority was to consist of the Executive Committee of the Lead Industries Association and the chairmen of some of the various divisions of that Association, and I became automatically a member of the Code Authority because I functioned as a chairman of one of the divisions.

Q. What did your contribution consist of in that organization?

A. Which organization?

Q. As a member of the Executive Committee of the Lead Industries Association.

A. I was not a member of the Executive Committee of the Lead Industries Association. I said that my membership on the Code Authority was automatically the result of the fact that I had been a chairman of one of the divisions.

Q. What was your activity on the Code Authority?

A. I had very little activity on the Code Authority as such. I was active in serving on some of the various committees in connection with the development of the Codes. As I recall it, the Code Authority met usually in New York, and my recollection of participation in those meetings is very meager.

Q. Did you have any particular interest or purpose to serve in connection with the Code Authority?

A. I was very much concerned about the develop-
2515 ment of the Codes or the consideration of the development of Codes from the standpoint of a small producer of lead pigments, both lead oxides and of white lead and of white lead-in-oil, because I realized that if the industry were going to function under the NRA Act and were going to develop Codes that were to be improved by the NRA, that the interest of the small producer might be very much affected by the type of Codes that were developed, and I was quite anxious to participate in that work.

Q. When the Robinson-Patman Act was enacted in 1936, did that have any effect on your policy of pricing Euston Dry White Lead?

A. Yes.

Q. What was it?

A. Most of my testimony so far has related to white lead-in-oil, but you ask me now about dry white lead?

Q. Yes.

A. At the time you speak of, Euston Dry White Lead was priced at the ceiling of the National Lead Company on sales made to buyers other than those engaged in the manufacture of paint, and the paint manufacturers were sold at a price less than was charged the other industrial consumers, and while we were not certain that the requirements of the Robinson-Patman Act would affect that pro-
gram, yet we thought it would be more consistent to
2516 render any question out of the picture by raising our price to the paint trade to the same level as we

charged others, and that was done and Euston Dry White Lead was sold thereafter at the same price to all classes of buyers.

Trial Examiner Norwood: What do you mean by the "paint trade" there, the dealers?

The Witness: No, dry white lead is used principally by paint manufacturers who make ready-mixed paints, and we had found and had proven, over all the years of our operation of the Euston Lead Company, that we encountered continual resistance in the sale of our dry white lead to the paint manufacturers, and since they were the largest single outlet for dry white lead we had to recognize that, and all through the years did it by offering them dry white lead at a lower price than prevailed in general to other consumers, and in recognition of that we were able to command some volume from the paint industry. The Robinson-Patman Act and the conception that our company had of it brought an end to that practice.

By Mr. Hinds:

Q. And that was a uniform delivered price, or were there some exceptions?

A. A uniform delivered price to all customers wherever they might be located. On the Pacific Coast, my recollection is that there was a different price, but we very rarely sold on the Coast. I believe only on two periods in the 20 years or more did we ever make any sales on the Coast.

2517 Q. When you did in those exceptional cases make sales, how did you price this product on the Coast?

A. We priced it at the competition for dry white lead on the Coast.

Q. What effect, if any, did the enactment of the Robinson-Patman Act have on your policy of pricing white lead-in-oil in 1936?

A. It didn't have any effect upon our policy of pricing white lead-in-oil, although it did affect—no, not with regard to white lead-in-oil, it didn't have any effect upon it.

Q. You are now speaking of 1936 when the Act was enacted?

A. The Robinson-Patman Act, yes.

Q. Why was that?

A. Well, we observed first that there had been no changes that reached our attention on the part of competitors in pricing white lead-in-oil, and we were confronted

then, as we had been before and as we have been since, with the fact that we had to meet our competition as and where we found it; and furthermore, it was not our view that our pricing practice on white lead-in-oil in any way involved any violation of the Robinson-Patman Act as we saw it.

Q. Well, later did you discern any effect of the Robinson-Patman Act on your pricing of white lead-in-oil, or did it have any such effect?

A. I do not recall that it had any effect.

2518 Q. Did it affect your policy toward instructions, and so on, to your subordinates?

A. Oh, yes, we instructed our sales managers and the company instructed all of its sales executives to observe the requirements of the Robinson-Patman Act particularly with respect to pricing that would involve discrimination as between competitors.

Q. Now you have spoken of certain differentials. In your judgment were they sufficient in amount to have any effect on competition between your customers?

A. No, we didn't regard that the differences in premium prices for materials delivered at distant destinations would have any effect at all upon the competition as between jobbers and dealers and distributors, or any other class of buyer.

Q. Following the enactment of the Robinson-Patman Act, did you give any instructions to the Paint Divisions' sales managers in your retail stores?

A. Yes. They received instructions, as did all of those in charge of sales, to particularly avoid discrimination between competing buyers who came to the retail stores for merchandise.

Q. Did Glidden at length make available to its customers a consignment plan of selling?

A. Yes, with reluctance.

Q. What product was that?

A. On Euston White Lead-in-Oil only.

2519 Q. When was that? Can you answer that without referring to your notes?

A. I will have to get my notes again.

Q. If that will serve to refresh your recollection, please do so.

Mr. Wright: At this point, your Honor, I don't believe it is proper for him to read dates from his notes; that is,

unless the paper will refresh an independent recollection he has as to that time.

Trial Examiner Norwood: You may refer to that and then put the paper away and give us your recollection if it is correct.

The Witness: That is correct. My recollection is refreshed, and the consignment plan was authorized about 1939.

By Mr. Hinds:

Q. Was that plan exclusive or did you make available any other plan to your customers?

A. You mean was white lead-in-oil sold only on consignment?

Q. Yes.

A. No. The consignment plan was a tool that was put in the hands of those salesmen and sales managers who said they had to have it; but the company continued to stress the desirability of making outside sales of white
2520 lead-in-oil as against consignment sales.

Q. What were the circumstances leading to your making available this consignment plan of selling white lead-in-oil?

A. The circumstances were these: In following up and in putting continual pressure on the paint divisions' sales organization to maintain and expand their sales of Euston White Lead-in-Oil the sales reports from many of the principal white lead-in-oil territories stressed that the men would have to have the consignment plan out there, and if they were to be expected to maintain or increase the sales volume.

In response to that continued pressure the company decided to permit the handling of Euston White Lead-in-Oil via the consignment route of an alternate method with the direct selling program for the use of those salesmen who said they had to have it to produce sales.

Mr. Welch: Your Honor, may we have a short recess?

Trial Examiner Norwood: We will take a short recess.

(Short recess.)

By Mr. Hinds:

Q. Did you emphasize either that plan or the outright sale plan?

2521 A. We strongly emphasized and preferred the outright sale as against consignment distribution.

Q. What were the advantages that you offered in outright sales?

A. We offered a price advantage to the dealer or distributor as a means of again attempting to offset the competitive pressure of the consignment method of distribution.

I might add that during the period that we bucked the consignment plan, which was four or five years—

Q. (Interposing.) You mean "bucked"? You mean resisted it and refused to introduce it?

A. Refused to do it. We made as careful a study as we could from the distributors and dealers as to what the consignment plan was worth in terms of dollars and cents per hundred pounds or per pound of white lead-in-oil.

Q. To the consignee?

A. To the distributor. The purpose of that was to attempt to find a figure that would be a sales off-set to consignment distribution and that would induce the dealer to make an outright purchase rather than to deal through consignment.

Q. What was your objection to the consignment plan? Why did you resist it so long?

A. Our company had experienced a great deal of difficulty and other troubles with consignment methods
2522 of selling paint products, and white lead-in-oil was a paint item. In the case of our company many, many of the white lead-in-oil sales were made in conjunction with other paint items, invoiced on the same invoice—or it would have been convenient to invoice them on the same invoice—and obviously that was out of the picture if one was to be sold outright and the other delivery on consignment.

There were other fundamental difficulties with consignment in paint items that had to do with the spoilage of goods in storage and with the marring up and rendering unsalable the package, and with changes in the quality and colors and shades of items, so that the Glidden Company as a paint manufacturer was unalterably opposed to consigning anything of that sort.

Q. What was your experience with the consignment plan after you made it available?

A. We had the experience that so often happens when pressure is put on a sales organization to produce orders, and they give a reason for failure, and you meet the rea-

son, and you sell— We found, regardless, that the consignment method did not produce the volume of sales that had been represented it would.

Q. How long did you continue with it?

A. My recollection is that we continued that until 1941 or 1942 and then abandoned it.

2523 Q. You offered a printed form, did you, as contracts?

A. Oh, yes. Our Legal Department prepared a consignment agreement, which has already been introduced in this case.

Q. I show you Exhibit No. 650-A, introduced by the Commission, and can you state whether or not that is the form that you used when you did make such consignment transactions?

A. Yes, this is an actual Glidden consignment contract and has been signed by the customer.

Q. The terms were those therein stated, were they, when you used it?

A. Yes.

Trial Examiner Norwood: Is that in evidence?

Mr. Hinds: Yes, sir.

Trial Examiner Norwood: What exhibit is it?

Mr. Hinds: There are several of them, but this one is No. 650-A. Your Honor will recall several actual contracts were introduced, all on this same printed form.

Trial Examiner Norwood: Commission's?

Mr. Hinds: Yes, sir.

By Mr. Hinds:

Q. Did you follow the printed form of any of your competitors or did you get up your own form?

A. Our Legal Department prepared a consignment agreement that was our own.

2524 Q. When did you abandon this plan, did you say?

A. I said my recollection was 1941 or 1942.

Q. What were the circumstances that led to your abandonment of that plan?

A. Not only did the plan fail to produce the volume of sales that was expected of it, but it also produced some of the difficulties that we knew were inherent in the consignment method of distribution.

For example, it entailed reports of inventories on hand, and it entailed constant correspondence with the people who had consigned stocks and verifying inventories. It en-

tailed maintaining an investment on the part of the Glidden Company in this consigned stock.

It generally fell of its own weight. There was continued opposition throughout the company to consignment, and the pressure of that group of sales people who wanted it wasn't enough to continue it when they didn't produce with it.

Q. During the period Euston and Glidden were producing white lead-in-oil, what other companies were selling that product?

A. The National Lead Company, Eagle-Picher Lead Company, McGregor Lead Company, John Wetherell and Brother, Sherwin-Williams Company, and the Anaconda Company. Then, if you meant to include the entire
2525 period of Glidden's activities, there were many other paint manufacturers who purchased dry white lead and ground lead-in-oil themselves and put it on the market under their own brand.

From Glidden's standpoint what one or more of those were the effective factors in the competition?

A. We regarded the National Lead Company's Dutch Boy White Lead as the criterion of competition. Secondly, the Eagle-Picher Lead Company product, although that was, according to our observations, not a close second.

Q. What were the total results of your efforts to promote sales of Euston White Lead-in-Oil over these years?

A. We finally succeeded at the top of securing the maximum of about 8.2 per cent of the white lead-in-oil business during any one year.

Mr. Hinds: May this be marked for identification as Respondents' Exhibit No. 144.

(The document referred to was marked as Respondents' Exhibit 144 for identification.)

By Mr. Hinds:

Q. I show you Exhibit 144 for identification and ask you if you prepared that or caused it to be prepared?

A. Yes, sir. I had one of my assistants prepare this chart.

Q. What does it purport to show?

A. It shows in the form of a graph the percentage
2526 of the sales of white lead-in-oil made by Glidden in relation to the entire industry's sales of white lead-in-oil made during the same year plotted by years and

taken from the Glidden Company sales records and the statistics of the Lead Industry Association for the entire industry.

Mr. Hinds: Your Honor, I offer that in evidence. I would like to substitute the photostatic copy for the original.

Mr. Wright: I would like a pre-cross on the identification.

Trial Examiner Norwood: Very well.

Mr. Wright: You say the figures that are represented on the line were arrived at by the figures from the Glidden Sales Department in white lead-in-oil?

The Witness: They were derived from the Glidden Company's records of its sales of white lead-in-oil during those years.

Mr. Wright: Those are total sales of white lead-in-oil?

The Witness: Total sales.

Mr. Wright: And the figures against which they were compared were what?

The Witness: Total sales of all white lead-in-oil producers for the same year plotted as a percent, one to the other.

2527 Mr. Wright: Those were as reported by the Lead Industries Association?

The Witness: Totals for all producers as reported by the Lead Industries Association for those years.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It is received in evidence, and the photostat will be substituted for the original.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 144, was received in evidence.)

By Mr. Hinds:

Q. Did you prepare a similar chart with respect to dry white lead or basic carbonate?

A. Yes, sir.

Mr. Hinds: May this be marked for identification?

(The chart referred to was marked as Respondents' Exhibit 145, for identification.)

By Mr. Hinds:

Q. I show you Exhibit No. 145 and ask you if that is the chart that you prepared with respect to dry white lead?

A. This is the chart that my assistant prepared at my direction.

Q. What does that purport to show?

A. This shows the sales by years of dry white lead basic carbonate by Glidden expressed as a per cent
2528 of the total sales of all dry white lead producers by years.

Mr. Hinds: I offer that in evidence, and I would like to substitute the photostat for the original.

Mr. Wright: Mr. Sprague, how are these percentages expressed—in tons or dollar volume.

The Witness: They are expressed in per cent. I will explain it to you, Mr. Wright.

For example, the year 1935, Glidden sold just under 18 per cent of all the white lead that was sold in that year, according to the Lead Industries' statistics.

Mr. Wright: Is that 18 per cent by value or is it expressed in volume?

The Witness: By weight.

Mr. Wright: That has nothing to do with sales price?

The Witness: No.

Mr. Wright: Were the figures on dry basic carbonate comparable figures reported by the Lead Industries Association?

The Witness: I don't understand.

Mr. Wright: Were the figures with which you compared the Glidden sales in this chart comparable figures to those which you mentioned in connection with Respondents' Exhibit 144?

The Witness: They were the figures as reported
2529 by Lead Industries Association.

Mr. Wright: Total figures?

The Witness: Yes.

Mr. Wright: And comparable to the Glidden Company organization?

The Witness: Yes.

Mr. Wright: No objetion.

Trial Examiner Norwood: The exhibit is received in evidence and the photostat will be substituted for the original.

(The chart referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 145, was received in evidence.)

By Mr. Hinds:

Q. Did you also cause to be prepared a chart relating by percentage to the sales of Glidden lead oxides in relation to those of the total industry?

A. Yes, sir.

Mr. Hinds: May this be marked for identification?

(The chart referred to was marked as Respondents' Exhibit 146, for identification.)

By Mr. Hinds:

Q. I show you Exhibit No. 146, for identification. Is that the chart you caused to be prepared?

A. Yes.

2530 Q. What does that purport to show?

A. This is a chart which portrays by years the percentage by years of the amount by weight of lead oxides sold by Glidden as compared to the total amount by weight of lead oxides sold by all other producers combined, as reported by the Lead Industries Association.

Mr. Hinds: I will offer that in evidence.

Mr. Wright: What products specifically do you mean to include in the term "lead oxides" in this exhibit?

The Witness: All lead oxides.

Mr. Wright: Does that include various grades of red lead and litharge?

The Witness: Red lead and litharge combined.

Mr. Wright: It doesn't include orange mineral or any of the other—

The Witness: The production of orange mineral was so small I do not recall with certainty whether that was included; whether it was or not would not amount to a fraction of a per cent. However, I would have to check as to whether orange mineral is in there.

Mr. Wright: As to these figures, I call your attention to the fact that they purport to relate to sales. Do they include in there these products that might be used by the Glidden Company in the manufacture of other articles?

2531 The Witness: I believe they do.

Mr. Wright: Do you have anything more than a belief as to that?

The Witness: No, I can't go further than that.

Mr. Wright: Were the figures on this exhibit, No. 146, comparable figures published by the Lead Industries Asso-

ciation, comparable to those that you testified about on Exhibit No. 144 and Exhibit No. 145?

The Witness: Yes, they are.

Mr. Wright: No objection.

Trial Examiner Norwood: It is received.

Mr. Hinds: I would like to substitute the photostat, if I may.

Trial Examiner Norwood: The photostat may be received as the exhibit.

(The chart referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 146, was received in evidence.)

By Mr. Hinds:

Q. In your judgment was there anything that your company did or could have done or refrained from doing which would have had any effect on competitive prices or pricing methods?

Mr. Wright: I object, your Honor, to that question. It obviously calls for broad general conclusions on the part of the witness and no evidentiary facts.

2532 Mr. Hinds: Your Honor, we are asking for his judgment. His company is charged with conspiracy and improper motives, and so on; and we have shown this gentleman to be a man of broad judgment and experience in the field. It would be in the nature of opinion. I think we have qualified him for opinion evidence within that field.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Mr. Hinds: In the industry, of course.

Trial Examiner Norwood: I think he may answer that. You may cross-examine on it. Objection overruled.

The Witness: Nothing whatever.

By Mr. Hinds:

Q. What was Glidden's policy with respect to the gross margin on these lead pigments?

A. We evolved the policy of attempting to price our pigments at the ceiling competitive market so as to enjoy the maximum attainable gross margin from our sales volume. That was done because we had learned again and again that we were limited within a very narrow range of margin between our cost of lead and our selling price, and we had to live within that; the more we sliced at it

from either direction, the more severe was our problem and the more difficult it was for us to survive.

2533 Q. Now, take up dry white lead. What is the technical name for that?

A. White lead basic carbonate.

Q. What is the formula?

A. No, I would have to refer to the textbook on that complete formula.

Q. But it is known as basic carbonate?

A. Basic lead carbonate.

Q. How did your company's relationship to that industry compare with its relationship to the white lead-in-oil industry, which you have previously described?

A. We attained in the sale of dry white lead a somewhat larger share of the total industry through these years than we had in the case of white lead-in-oil or in the case of oxides.

The reason for that was that the differences of quality in white lead when sold dry to the industrial concerns who are the buyers was more readily discernible and more readily salable, and we succeeded in making a creditable showing because we did improve our quality materially through the years.

In fact, we were the first to initiate the manufacture and sale of some types of white lead in this country.

Q. What was Glidden's role in the dry white lead industry, substantially?

2534 A. Just as in the case of the other lead pigments, we were essentially a follower in the industry, a minor and a small part of the industry.

Q. How did your prices for that product compare with those of National Lead?

A. That requires a bit of explanation. At the time—

Trial Examiner Norwood: (Interposing.) Just answer the question and let the explanation come out later.

The Witness: What was the question?

Trial Examiner Norwood: Read it.

(The question was read by the reporter.)

The Witness: Our prices compared with National Lead's prices in that, as our quality improved our price relationship approach that of National Lead. In the early years when our quality was low, our prices were correspondingly low, and as we went on and, as I have explained before, we eventually ceased to make any price concession at all on dry white lead.

By Mr. Hinds:

Q. Just prior to 1936 and in 1936 what was your policy in selling dry white lead?

A. We sold our dry white lead at the same competitive levels as that of the National Lead Company to all purchasers other than paint manufacturers.

Q. What about those?

2535 A. They received a concession or a set-in price of 1/8th cent per pound.

Q. Why did you give them that concession?

A. We found there was antagonism to purchasing white lead from the Glidden Company on the part of its competitors. They felt that the more they sustained the Glidden Company's activities, the more difficult would the Glidden Company competition be in the paint industry; and the tendency was to prefer to purchase dry white lead from other sellers.

Q. You told us about changes in prices of white lead-in-oil. How did they compare with changes in the prices of dry white lead?

A. We learned from the start that changes in the price of white lead-in-oil, market price, very closely corresponded to the average movements in the cost of pig lead to the same extent as they responded to average movements in the price of white lead.

Q. What, if any, role did you have in the Lead Industries Association?

A. I was a director of the Lead Industries Association for many years.

Q. What knowledge did you have as to the views and attitudes of its officers and directors?

A. I had a good knowledge of their views.

2536 Q. What were the activities of the Lead Industries Association in respect to prices, pricing, conditions of sale, or methods of sale of lead pigments?

A. No activities in regard to those matters.

Q. What was the attitude of the officers and directors toward any such activities?

A. They were opposed to it, and the Lead Industries Association officers and directors for the most part were not interested in the pigment business particularly.

Q. What were the predominant interests of the Lead Industries Association?

A. The mining and smelting interests.

Q. What was their attitude toward methods of selling and pricing products made from lead?

A. They were not concerned with the minutiae of those matters that pertained to all the products made from lead.

Q. What were the circumstances which led Glidden to lend its support to that Association?

A. We felt that Glidden owed support to the Association because of some very excellent work that it did. We were a very small part of the lead industry, and that support could be accorded at a fee that was also in proportion to the amount of Glidden's business, and the Association conducted some work in which we were interested and
2537 which we thought was of great value to the industry and to us.

Q. What, if anything, did the lead industries do or contribute with respect to lead pigments?

A. The most outstanding work conducted by the Association was research in connection with lead toxicity as an industrial hazard, particularly with respect to the lead pigments. That has a very significant value to the lead pigment business.

The Association supported researches at Harvard over a long period of years and took an active part in the Public Health Association work and in efforts to have a sound scientific knowledge of the true facts about the toxicity of lead about which there was a great deal of misinformation current in the public press and in the public mind.

I think the Association's work in that is the outstanding contribution to industrial hygiene and toxicity work that I know of.

In addition to that, the Association represented the industry in matters relating to tariff hearings and various legislative matters that came up in Congress, and they provided a means for promotional activities in respect to the sale of white lead and of red lead.

The Glidden Company did not participate in the white lead-in-oil promotion program of the Association;
2538 but, nevertheless, it was a very comprehensive scheme designed to promote the use of white lead-in-oil.

Q. What, if any, part did the Association play in connection with the activity of the manufacturers of dry white lead in connection with the Federal Specifications Board?

A. None.

Q. What, if any, information or service did Glidden

receive from the Association with respect to the prices or pricing methods?

A. Nothing.

Q. Did you ever see any evidence of any activities of that sort by or between the Association or any of its members?

A. None whatever.

Q. Where was Glidden's manufacture of lead oxides handled?

A. At the Metals Refining Company, Hammond, Indiana.

Q. Where was the sale of lead oxides handled?

A. The sales were handled in their details at the office at Hammond, Indiana.

Q. What was your connection with Metals Refining Company?

A. I became the Vice President and General Manager of the Metals Refining Company about 1930 and was in charge of the operation of that business for a period of years thereafter until 1935.

After that I was in general charge of the sales of 2539 chemicals, pigments, and metal products of the company, which included an administrative responsibility for the sale of lead oxides.

Q. How much of a factor of the total operations of Metals Refining Company was its production of lead oxides?

A. The lead oxide business was a minor factor.

Q. What else did it make?

A. Metals Refining Company at that time were primarily engaged in the smelting and refining of non-ferrous metals, particularly lead and lead-bearing metals, and the so-called white metals such as lead, antimony, tin alloys.

Metals Refining Company was also a manufacturer of type metal and babbitt metal, and in that period developed the production and manufacture of various metal powders.

Q. What metals?

A. Powdered metals?

Q. Yes, sir.

A. Lead, copper, iron, and tin principally. Also developed a large production of the various oxides of copper.

Q. Had its production of lead oxides been a recent thing or a long-established thing at the time you took over?

A. No. The Metals Refining business when sold to Glid-

den in 1929 had but recently completed the erection of a plant for the manufacture of red lead and litharge and had not been far established in the business.

2540 Q. When you took over, what price policy did you find was in effect with that concern with respect to the lead oxides?

A. I found that the price policy of the former management was very similar indeed to that of the Euston Lead Company. The lead oxides produced were of irregular quality. They were sold at sub-market prices. The management explained to me that they had the theory that they could maintain a profitable operation in that area by laying less stress upon uniformity in quality than they did on cost, and by cutting—

Q. (Interposing.) You mean price?

A. Cost.

Q. Pardon me.

A. And by cutting the price under established market levels they could get sufficient volume within areas reasonably contiguous to Hammond to make their business go.

Q. Well, did you inaugurate any changes in that policy when you took over Metals Refining?

A. Yes, I did, because I had been through the mill and learned in the hard way some of the facts of life about this lead pigment business.

Q. What changes did you inaugurate?

A. In the first place, I was convinced after study-
2541 ing the margins that were possible in the sale of lead oxides in respect to competitive price levels that we would have no more chance of success in developing profitable sales there at cut prices than we found we had been successful in developing them in the Euston Lead Company.

2542 I also realized that I couldn't expect to bring my prices up to competitive ceilings until I had gotten my product in quality up to or approaching competitive ceilings.

So we undertook a program of improving the quality of our lead oxides, and also a program whereby we could produce a number of additional grades of lead oxides that were originally produced, thus to enable us to command activities in a wider market and a better chance to bring our volume to the point where we could earn a profit.

Q. Turning back to white lead for a moment—from your experience in the white lead business, what was the relation-

ship, if any, between costs and prices and profits in promoting that commodity?

A. The relationship between costs and prices and profits was a very simple one because the cost phase was so completely dominated by the cost of lead. So the position that the producer could maintain in his business, the relation between his lead cost and his product sales largely determined what margin he could earn and how he could come out.

Q. Coming back again to the lead oxides—was that substantially the same relationship or was there something different?

A. The same relationship, only much more so, because the margins were still narrower in connection with the lead oxides and the methods of sale, which provided that the price was determined in terms of a fixed differential
2543 over your cost of lead gave you very much less leeway than was the case if prices didn't move so quickly with respect to the cost of lead. You had to be right on the button.

Q. When you took over Metals Refining, what was your program respecting lead oxides?

A. Well, our first program was to improve the quality of our product, and we made plant investments to that end.

The second part of the program was to see if we could better our cost of lead position, not by trying to beat the lead market, but by trying to utilize scrap lead.

One of the principal activities of that plant, which was at that time one of the largest secondary lead smelters in that area, was to recover lead from scrap and residue sources, which contained lead, such as drosses, old storage batteries, and any type of junk that contained lead, antimony, or tin. At that time there was a large tonnage of battery scrap that flowed into the Chicago market from very far-distant points, points as far west as Spokane, as far south as Nashville, or as far east as Pittsburgh.

Trial Examiner Norwood: What time was that?

The Witness: That was the time I went to Hammond as the general manager in 1930. There were at that time in Chicago only a few smelters equipped to handle that volume of lead scrap. Our plant was one. We normally handled upwards of 2,000 tons per month.

2544 Up to that time the basis upon which the lead-bearing residues in scrap could be purchased was such as

to enable it to be refined and lead recovered at a cost somewhat less than the prevailing St. Louis lead market deliverable at Chicago. Obviously, if we could succeed in making from such scrap sources a variety of recovered lead that was pure enough to use in producing red lead and litharge, we would then have an advantage over those of our competitors who depend upon the purchase of pig lead upon the open market to make into lead oxides. We tried that plan, and we invested in a series of equipment and developed a process designed to continuously produce corroding grade of lead from scrap.

We put that plant into operation and thought we had gotten somewhere, but our advantage was short lived, less than a year. By that time the relationship between the cost of lead in scrap and the cost of scrap itself and the pig lead market was such that it was no longer profitable to produce a high quality of lead from such scrap was compared to buying it again in the open market, and we were back where we started from, having made our investment for naught.

I knew then that we were not going to be able to get any advantage over the other fellow as far as our lead cost was concerned, and I had learned before that we couldn't get any sales at higher prices than competitive levels unless we could succeed in making again some type of lead
2545 oxide that had properties or characteristics that would enable it to sell at a premium in the lead oxide market.

So we repeated our experience at Euston. We strove to accomplish that, and the result of our striving was that we did make some special types of lead oxides with some unusually careful controls and classifications, so they would command a preference in the market, but never would they command a premium in the market because the standard quality of lead oxides produced was in general high. Corroding lead was available on the market in large tonnage, and that is one of the most pure metals that exists in large tonnage anywhere. It is a very pure form of lead, and with it a very high grade pure form of lead oxide can be produced.

So our realization of our effort to get a higher margin through premium prices failed for the same reason that it did in white lead, but we ultimately did command some market preference so that we could sell at competitive ceil-

ings. That process with us was gradual. We approached it from all angles at once, and it took a period of years to evolve some success from it.

Q. Did you distinguish between your read lead business and your litharge business with respect to the gross margin there?

A. Yes. The market prices for red lead, according to our costs, provided a somewhat wider margin for use than litharge, and was more profitable for us to sell a ton
2546 of red lead than to sell a ton of litharge.

Q. Did you have any separate policy with respect to the promotion of red lead?

A. Yes, sir.

Q. What was that?

A. As soon as I realized we had a greater profit in red lead, we naturally stressed the sale of red lead and we went further and installed some equipment by which we could make red lead at topnotch quality.

Q. After you became more familiar with the lead oxide business generally, what did you find was required for successful operation in that field?

A. Well, it was very simple and almost determinable by mathematics. Our lead cost was so much, we had such a maximum market, our production was such a tonnage, and now we had to price our product so as to enjoy the maximum gross return that we could get for the sales volume that we could figure within the framework of the volume capacity of the plant. Our problem was identical with what it was at Euston lead plant on white lead in its economic fundamentals.

Q. What was the result of maintaining the balance between lead purchases and lead oxide sales?

A. The result of maintaining a balance in the lead oxide business is that you enjoy neither losses nor gains from market movements.

2547 Q. You mean speculative inventory gains or losses?

A. Losses or gains from market movements on the sales that you make. Of course, you can't avoid a loss or a gain on a working inventory with market changes. That is unavoidable.

Q. Was there anything else you inaugurated there besides what you told us after you became familiar with the lead oxide business?

A. Yes, we undertook as a part of our efforts to qualify our product for acceptance in uses where special care would provide a preference for the product among the trade, we cultivated those types of outlets and tried to get ourselves independent of doing business with the storage battery industry, which was the largest consumer of red lead and litharge, and with which industry we could earn the least profit.

Q. How did you cultivate those outlets?

A. In the manner that I have mentioned. We studied the requirements of the customer. We endeavored to arrive jointly with him at a specification which we could maintain by special care in our processing. The result was that he could use our litharge—usually that pertained to litharge more than to red lead—he could use our litharge with greater uniformity of results to him.

For instance, it was used in such things as processing litharge into chrome yellows and chrome greens, or such things as sweetening gasoline in the petroleum in-
2548 dustry where litharge provided distinct factors to those consumers.

Q. Did you have any local competition with lead oxides in Hammond?

A. At the time we acquired that business, there was no production of red lead and litharge, to my knowledg, in that area. However, a year or two after we got started, the former owners of the Metals Refining Company—

Q. (Interposing.) About 1932?

A. I think about 1932. The former owners decided to re-enter the business of making and selling red lead and litharge. They put a plant up almost across the street from ours—not quite that close.

Q. What was the result of that?

A. That created a very difficult competitive situation for me because my new competitors knew all my customers and their preferences and their prices, and I had a great brake placed upon my effort to try to improve my position.

Q. You spell that b-r-a-k-e?

A. B-r-a-k-e.

Q. Now, when the Robinson-Patman Act was enacted in 1936, how did that affect your lead oxide policy?

A. That affected our pricing policy in the lead oxide business both directly and indirectly. The first effect that

I recall after we all had come to some understanding of just what the Robinson-Patman Act meant—in that
2549 connection, I recall going to Chicago and listening to Mr. Patman at a symposium explaining what the Act meant, and I have been astonished about what has come out of it since as compared to what he said then his law meant—that one thing we did was, as we had done all through our company, was to instruct our sales managers to comply with the Robinson-Patman Act.

In order to comply with it, as we saw it, we had to be a great deal more careful to determine what our competition was in order to be sure that we were as accurate as we could get, and weren't shooting in the dark. It placed a greater responsibility upon the management of the company in regard to meeting price competition than had existed heretofore.

That was constantly a problem that confronted us because we had a very difficult competitive situation. We had our former—the former proprietor of our company—

Q. (Interposing.) What was his name?

A. Hammond Lead Products Company—doing business next to us with a price policy similar to that which those men had employed when they sold their business to Glidden. Their concept was that secondary quality—first question, low cost of manufacture, low price to the consumer, and let it go.

Well, we would never know exactly what we were going to meet by way of competition in the lead oxide market in that area from day to day until we encountered it. It was a very severe problem to place enough restraint upon
2550 our sales people to really ascertain what their competition was, because, obviously, that condition creates a buyers' field.

Q. You have used the expression "what the competition was." You mean the exact competitive price you had to meet at a time and place?

A. I am speaking of competitive prices, yes.

Q. As the basis of your experience, what in your opinion is the principal factor in the sale of lead oxides?

A. It is perfectly obvious that the dominating factor in the sale of lead oxides is the cost of lead.

Q. What is the principal outlet for lead oxides?

A. The largest single group of consumers is the storage battery industry.

Q. How is that made up? How is it constituted?

A. During the period in which I was in contact with it, which we have been discussing here, the storage battery industry consisted of two groups of units. One group was large in number, poor in financial stature, weak in credit, and short on technical knowledge. The other, and smaller group, were large manufacturers, large consumers of oxides, excellent financial standing, good credit risks, and very ably staffed technically.

Q. Did you have any experience in selling to the large battery manufacturers?

A. Yes, but limited experience.

Q. Just tell us what that experience was, even
2551 though limited. Tell us why it was limited.

A. The first thing I found was the large storage battery manufacturer was getting pretty low prices from my competitors on his requirements of red lead and litharge, and then the next thing I found out was that if anyone tried to improve that situation he was told that the battery man would make his own oxides. I found both of those things were true.

Q. Could he make his own oxides practically?

A. Yes. As soon as the consumption of lead oxides reaches a practical manufacturing point, anyone who has that consumption can economically make them, themselves, and that is particularly true with litharge because the investment required in equipment to enter the litharge was relatively small.

Q. Now, what was your experience in selling to the smaller battery manufacturers, particularly insofar as it contrasted with the largest ones?

A. We got it in just the reverse fashion. The smaller battery manufacturer was salable at higher prices, but the cost of selling him was sufficiently high to end up in an offset.

Q. What is meant by black oxide?

A. Black oxide is a form of lead sub-oxide that was discovered to have excellent applicability in the manufacture of negative plates for a storage battery.

Q. Is that an advantage to any type of purchasers of lead oxides?

2552 A. Oh, yes, sir. It is an advantage to any battery manufacturer to develop the technique of making a negative plate from black oxide, and it is of great advan-

tage to the large battery manufacturer who uses enough tonnage to justify his own manufacture of black oxide.

Q. Now, let us take up your policy of pricing lead oxides. What were the factors underlying your policy there?

A. Cost and competition.

Q. Were you successful in your program of pricing lead oxides, which you had?

A. Only moderately so.

Q. Why do you qualify it?

A. I qualify that because the margins were so narrow and the time factor that was involved in establishing the relationship with those various groups of consumers with whom we should deal satisfactorily at the ceiling prices was long, and while we did pull the read lead and litharge business out of the read, we never had anything to write home about.

Q. By "time factor," you mean it took long to get their confidence?

A. A long period of time, yes.

Q. What has your policy been in pricing lead oxides? You told us about the factors.

A. The policy has been to price lead oxides as close to the ceiling maintained by competition, principally
2553 National Lead Company and the Eagle-Picher Lead Company, as we possibly could, and to name our prices for the most part at those ceiling levels.

Q. Now, the Glidden Company, of course, is engaged in producing and selling other products besides these various lead pigments, is it not?

A. The Glidden Company has a very widely diversified business, yes.

Q. Will you just roughly tell us what the other products are and how generally they relate in importance to these lead pigment products?

A. Well, the lead pigment business of the Glidden Company is relatively small, both in weight or tonnage and in dollars, compared to many of the other company's products. However, the purpose of the Glidden Company in acquiring these lead-pigment producing units arose first from its policy of developing a diversified chemical business, and, secondly, from its policy of desiring to protect its position in respect to the principal raw materials used in its paint manufacture, since paint was one of the large phases of Glidden's business.

Q. By "raw materials," you mean in this instance manufactured raw materials, such as oxides, dry white lead?

A. Whatever the raw materials are that go into the production of paint, of which white lead was an important factor, read lead a less important factor, and, of
2554 course, lead-in-oil, which we have discussed.

I think the important point in regard to Glidden's position, if I understand your question, is that whereas Glidden in both of these operations; namely, red lead and litharge business at one location and white lead business at another location, while those were small, a very small part of the total industry of which they were a part, yet the proportion of the production of those units that was used by the Glidden Company in its other operations was always small.

The result was that while Euston was a small producer of white lead and Metals Refining a small producer of lead oxides, yet we had to maintain a satisfactory consumer acceptance, and we had to sell the preponderating proportion of our production in the open competitive market, and we were not sustained in any way in those operations by the requirements taken by Glidden, itself.

Q. In other words, you had to sell most of it rather than use it yourself?

A. By far the preponderating proportion we had to sell in the open market in competition with the trade.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time until 9 o'clock, Eastern Standard Time, tomorrow morning.

(Thereupon, at 3:10 o'clock p. m., Eastern Standard Time a recess was taken until Wednesday, May 14, 1947, at 9 o'clock a. m., Eastern Standard Time.)

2555 Room 332, Federal Trade Commission Building, Washington, D. C., Wednesday, May 14, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815—15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, Esq. (1649 Union Commercial Building, Cleveland 14, Ohio), and Roger Hinds, Esq. (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2556 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., Eastern Daylight Saving Time, on the 14th day of May, 1947.

Mr. Sprague will please resume the stand for further direct examination.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Hinds.

Q. Mr. Sprague, except during the period when the Code was being developed, did you or your company ever give or receive any price information or any reports or

any data whatsoever from the Lead Industries Association concerning prices of lead pigments or any of those products?

A. No, sir.

Q. Did you ever give or receive from the Lead Industries Association any information about differential zones relating to lead pigments whether used by Glidden or by any other producers?

A. No, none, other than during the period of the NRA.

Q. Did you ever give or receive from the Lead
2557 Industries Association any information about freight rates concerning lead pigments?

A. No, sir, at no time.

Q. Did you ever give to or receive from the Lead Industries Association, except during the period when the Code was being developed, any information or data regarding any other so-called cost factors or price factors with regard to lead pigments?

A. No.

Q. When Glidden has reduced its price of lead pigments, what have been the circumstances which have led to such a reduction?

A. The dominating circumstance was that we found we could make no sales unless we promptly reduced our prices to respond to competitive reductions. Therefore, the only consequence of failing to reduce was to go out of the market.

Q. You have already stated what you had observed as to circumstances which led to a reduction, but as far as you were concerned you reduced when your competitors reduced, is that it?

A. We reduced when competitors reduced, in order to stay in business.

Q. Well, now, what has Glidden's practice been with respect to inventories of your raw materials, goods in process and finished goods in the lead pigment field?

A. We learned from our experience that the only
2558 way to keep our market losses, our inventory losses, low was to maintain the minimum practical working inventory, both of raw material and of finished product. In that manner we could avoid the market gains and losses, which we sought to do.

Q. When you have reduced your price on a lead pigment, what effect has that had on the percentage cost of your raw materials as a percentage of your lead pigment?

A. Well, of course, as soon as prices are reduced, the percentage cost of the pigment sold thereafter in relation to the selling price becomes higher.

Q. Until you work it off?

A. Until the inventory has been brought to the prevailing market on which the sales are made.

Q. Well, now, when Glidden has increased its price of any lead pigment, what have been the circumstances that have led it to such increase?

A. Well, I endeavored to explain in my testimony here yesterday the reasons for Glidden's immediate increasing of prices to follow the market, which rested upon the necessity of doing so in order thereby to earn the maximum average gross on the sales. In other words, if we failed to increase the price as the market advanced, we would in effect cut off a portion of the attainable average gross margin.

Q. In so doing, was the fact of the inevitable losses when the market declined, that you have already
2559 spoken about, a factor?

A. Well, of course I spoke of the over-all average position. The immediate consequence of an advance would be to recoup, theoretically, from the advance the same loss that was sustained on a decline, provided the inventories were the same at both times.

Q. Has Glidden, to your knowledge, or any of its divisions, at any time been under any constraint or obligation, express or implied, which has prevented it from charging any price or adopting any pricing practices or methods that it has regarded as best suited to its own commercial interests?

A. Not in the least.

Q. What fundamental motive has actuated Glidden in charging its prices and adopting its pricing and selling methods?

A. Well, the fundamental motive in doing that was to survive and earn a profit within the framework of the maximum price obtainable and the cost of lead required to produce the merchandise. If I understand your question correctly, that is a subject that I covered rather thoroughly yesterday in explaining why it was necessary to raise prices and why it was necessary to lower prices.

Q. Now so far as you personally are concerned, or so far as any other Glidden man is concerned that you know

of, has there ever been any sense of moral obligation or esprit de corps or feeling of fellowship or solidarity
2560 with any of your competitors which has determined to any degree Glidden's prices or pricing methods?

A. No.

Q. From your observation, what is the competitive condition which exists in the lead pigment industry and has existed prior to the filing of this complaint?

A. Do you mean as to the intensity of competition?

Q. Yes, the conditions with respect to competition or the lack of it.

Mr. Wright: Objection. It calls for a conclusion on the part of the witness.

Trial Examiner Norwood: Read the question.

(The reporter read the record as follows:

"Q. From your observation, what is the competitive condition which exists in the lead pigment industry and has existed prior to the filing of this complaint?

"A. Do you mean as to the intensity of competition?

"Q. Yes, the conditions with respect to competition or the lack of it.")

Trial Examiner Norwood: The objection is overruled.

A. My observation is very definite that through the entire period of my contact, the competition in the industry has been keen as among the units in the industry, and
2561 certainly as between Glidden and the industry.

By Mr. Hinds:

Q. Has there ever, during your knowledge of the situation, been any time when you regarded it as being in Glidden's commercial interests to initiate a price change of lead pigments, either up or down?

A. Very rarely. I should say no, it has never been to Glidden's commercial interest to initiate a change in prices.

Q. Why is that?

A. The reason is as I have described. If Glidden attempted to raise prices, it priced itself out of sales. If Glidden did not reduce prices, the result was the same.

Q. Have you, or to your knowledge has any other representative of The Glidden Company, ever received any request, any suggestion or any intimation, from any of your competitors, as to what role Glidden should follow with respect to Glidden's pricing and pricing methods?

A. No, I recall of none.

Q. During the period of your knowledge with relation to the lead pigment business of Glidden, has there been, or in your opinion could there ever have been at any time, any important adoption or change of policy or negotiation or agreement made with anybody outside of your company, with respect to lead pigments or the pricing of lead pigments, which you would not have known about promptly?

2562 A. No, I don't think that could have been done.

Q. Well, then, did your company at any time, to your knowledge, enter into any agreement or understanding or arrangement with any other producer or seller of any lead pigments, with respect to the fixing of prices or with respect to any pricing method?

A. No, sir.

Q. Has any such arrangement or understanding or agreement come to your knowledge?

A. On the part of Glidden?

Q. Yes, sir, that is what I meant.

A. None.

Q. Have you ever heard of any?

A. No.

Q. Did anyone in your company have any authority to enter into any such agreement, understanding or arrangement?

A. Well, there were people in our company who had authority to make agreements, but no such agreements were made that I know of.

Q. Did they have authority to make such an agreement, if you know?

A. Well, the corporate officers no doubt have authority to make any type of agreement that is legal on behalf of the company. The power was certainly there to do that if someone desired to do it and thought it was legal to do it.

2563 Q. Well, did your company, either through you
2564 or anybody else, to your knowledge, at any time enter into any such agreement, understanding or arrangement?

A. No.

Q. You understand that in these previous questions I have been including oral as well as written understandings, agreements or arrangements, do you?

A. Yes.

Q. Have you found the relationship between pig lead prices and the prices of lead oxides to be more sensitive or to be less sensitive than the relationship between pig lead prices and prices of white lead and white lead-in-oil?

A. Well, very much more sensitive, because the major tonnage of the lead oxides sold are sold in carload lots, and they are priced directly on the pig market each day.

Q. From the standpoint of your economic relationship to the industry, what is the role of a manufacturer of lead oxides, what does he do in the economic field?

A. Well, in effect he is a converter of metallic lead to lead oxide at what is in effect a toll charge.

Q. What attitude did you and your company take during the period of the development of the Code, with respect to the suggestion that the assembling and distributing of price reporting might be engaged in?

A. Well, I think I represented the company's atti-
2565 tude, it was left to me in that matter, and my own view was, at the start of the Code discussions, that price reporting might be a constructive method of accomplishing the purposes of the NRA, but I changed my views after consideration of the question and what was involved in preparing to do adequate price reporting, to the point where I questioned that it was a good thing to do, and I was opposed to it.

Q. You have spoken of areas with respect to distribution of white lead-in-oil where the differentials were different. What have been the factors in your own delineation of the boundaries of those areas?

A. Well, the principal factor and determining factor in our delineation was the competitive practices of the market leaders in the sale of those products. We also had to take into account the necessity of recognizing localized areas where a question of selling to people who directly competed with each other in those areas was involved.

Q. Taking into account those differentials, have your sales in the remote, the more remote regions from your plant been more or less profitable to Glidden as compared to the sales in regions near your plants? I am talking about the sales of lead pigments.

A. The sales in the more remote delivery destination points have been in general less profitable to us, because we were obliged to make shipments from one producing point in each case.

2566 Q. Why have you continued to offer your goods in those regions, then?

A. Well, the situation that led us to do that and which leads us to continue to do that, rests upon the requirement, fundamentally, that we obtain as much volume in those plants as we can within the scope of their capacity, and all through the years I can never recall a time when we had volume sufficient to fully occupy the capacity of the lead oxide plant, and very rarely a volume sufficient to occupy the capacity of the white lead plant. Now when we couldn't get volume within the nearby areas, we had to get volume further and further away, up to the point where we sustained an actual loss.

Q. Have you ever heard the suggestion from any source that for your uniform delivered prices you might consider substituting uniform f. o. b. mill prices? Have you heard of such a suggestion from any source?

A. Well, I have heard that suggestion in connection with some of the Federal Trade Commission matters that have been discussed with me in connection with this case. I never heard it from anybody in the trade, either buyer or seller.

2567 Q. Exactly. Have you given any consideration—yes or no—to what in your opinion would be the consequences of carrying out any such plan from the standpoint of Glidden—yes or no?

Mr. Wright: Objection, Your Honor. By the witness' own testimony he has never employed such a method for marketing and obviously it calls for suppositions and guesses and conclusions of the most unreliable sort.

Mr. Hinds: I merely asked him if he had considered it. The sixty-four dollar question would presumably come lated. Maybe he will say that he hasn't considered it, and in that case I wouldn't be able to ask him what the result of his consideration had been.

Trial Examiner Norwood: I think we must draw the line somewhere. I want this witness to give us the full details about his business, but this is purely speculative here. I think we have come to the point when we must stop this line of testimony.

Mr. Hinds: I would like to make a proffer—

Trial Examiner Norwood (Interposing.): I will sustain the objection, and counsel may make his proffer.

Mr. Hinds: We proffer this witness as an expert in

marketing and pricing problems, pricing method problems, in connection with the lead pigments industry, and that he would testify that in his opinion, for what it may
2568 be worth, in view of those qualifications, an f. o. b. uniform price system in the lead pigments industry so far as this single plant producer is concerned would put them promptly out of business.

Trial Examiner Norwood: Now counsel may show any factual conditions which would bear on that question of whether or not it would be practicable or profitable for him to confine himself to the f. o. b. mill price. But put it in on that basis.

Mr. Wright: I would like to add to my objection, Your Honor, and also state for clarification of counsel that there is no suggestion in this complaint that the effect would be to require this respondent or any other respondent to establish a uniform mill net system of pricing or any other system of pricing. So the whole matter is an irrelevancy.

Trial Examiner Norwood: I thought, in connection with my ruling, that it was of doubtful relevancy, even the fact that I stated that if you had some factual material to put in on that point you might do so, but that is going as far as I think we should go in this investigation.

Mr. DuBose: Well, Your Honor, Mr. Wright has made the statement that there is no suggestion in this complaint that any respondent should be required to go on an f. o. b. mill net. It seems to me that the necessary result of the allegations of Count II would lead to the conclusion that any other system under the Commission's theory is
2569 discriminatory unless the delivered price makes, in the Commission's mind, only due allowance for transportation.

Mr. Wright: Your Honor, as to Count II I want to state right here that the theory of Count II is systematic discrimination, that is the principal theory, systematic discrimination for the purpose of matching and meeting prices as between these respondents.

Mr. Hinds: I must respectfully differ from my opponent as to what the Commission is claiming and what the complaint claims, because we have it on very high authority, including some of the Commissioner's published statements, and Mr. Woodin in many of his statements, interpreting this complaint, that this complaint indeed among other things seeks to proclaim as illegal per se

under the Robinson-Patman Act, entirely apart from collusion or anything else with other producers, the mere charging of the same price to two competing customers at different distances from the mill. So we are obliged, unless we can have a very authoritative disclaimer of that to us very fantastic contention, to assume that the fantastic contention confronts us, and that was one of the reasons for my seeking to bring out from this witness what the results would immediately be to his company.

Mr. Wright: I want to say that Count II of that complaint goes to any method of pricing which systematically
makes differences in real prices for the purpose of
2570 matching prices, whether it be a delivered pricing
system or a mill net system, or whatever other type of system.

Mr. Hinds: The word "matching" being a word which has recently been judicially condemned from a very high source.

Trial Examiner Norwood: Counsel's statement there about what the Commission has held and stated I don't think is very well based. I remember a recent case which returned the order requiring them to cease and desist from applying the delivered price method for the addition to the order of the words "through agreement and collusion". What was the name of that case, do you remember?

Mr. Wright: I can't recall it offhand, Your Honor.

Mr. Hinds: Your Honor has already ruled on this question and I merely made a proffer. I am not arguing further against Your Honor's ruling. I made the proffer.

Trial Examiner Norwood: The ruling will stand. If you can show any facts which bear on this subject of whether or not people living nearer the mill are disadvantaged or discriminated against, we will receive that.

Mr. Hinds: I think I shall avail myself of the opportunity which seems to be suggested by Your Honor, to explore those factors a little more, without asking the sixty-four dollar question, as I might call it.

Mr. Wood: If Your Honor please, I have been
2571 trying repeatedly all through this case to find out just
what the Commission's position is as to Count II. I know I have made a nuisance of myself, I have argued it before the Commission and I have brought it up over and over again. But according to Mr. Wright's statement this morning I have been misinforming my client as to what

the case was all about, all the way through. I thought that it involved the legality of selling at a delivered price, and that the Commission, in accordance with its own statements and publicity, was attempting to outlaw this so-called delivered price selling.

Mr. Hinds: Uniform delivered price selling.

Mr. Wood: Yes, uniform delivered price selling. Am I now to understand that that is all out the window and that nothing is involved here except conspiracy?

Mr. Wright: All I can do in that connection is to refer counsel back to the complaint itself. If there have been any official statements regarding the issues in this case, made either by the Commission or other people on the staff of the Commission, they have not come to my attention. I think the principal issues of Count II are very plain.

Mr. Wood: In other words, do they involve uniform delivered price selling, or do they involve only conspiracy?

Mr. Wright: They involve discriminations alleged to have been conducted for the purpose and with the effect of eliminating competition in the primary line in which
2572 respondents are engaged.

Mr. Wood: By collective action rather than individual action?

Mr. Wright: No, sir.

Mr. Wood: That is what I am trying to get at. Does the complaint, in Count II, involve individual action as well as collective action, or only individual action?

Mr. Wright: I might say as to that, that Count II involves only individual action by each of the respondents.

Mr. Wood: And it doesn't involve uniform delivered price selling?

Mr. Wright: In so far as the manifestation of the uniform delivered price selling presents discriminations under the allegations of the complaint, of course it involves uniform delivered price selling.

Mr. Hinds: In other words, we discriminate between two competing purchasers by charging them the same price if they are at different distances, if that is what you mean.

Mr. Wright: I think the complaint is perfectly clear as to that, and I believe counsel have stated that there was no issue that they did not understand with reference to Count II of the complaint which related to this pricing method.

Mr. Hinds: It is only because of what you said this morning that we are again put in the condition of quandary.

Mr. Wood: I must have misunderstood counsel
2573 this morning because I understood him to say at an earlier time, in objecting to a question, that Count II involved a system of matching prices, which of course would necessarily involve more than one company. I don't care what the issues are but I would like to see them clear.

Trial Examiner Norwood: I want to explain, with respect to my remarks just made, which were more or less tentative, that I had in mind only the first Count, that I was speaking of it being based on agreement and collusion.

Mr. Hinds: Well, I had in mind more the second count in my question. But I will avail myself of the opportunity offered by Your Honor. I would first like to perhaps bring out more details as to Mr. Sprague's qualifications—

Trial Examiner Norwood: (Interposing.) I will be glad to hold an informal conference at any time for the purpose of clarifying the issues. We can go into each and every one of those things off the record so that we may speak very freely without being afraid of committing ourselves, and we will hold just as long a session as you want for the purpose of clarifying the issues, and that will be done at any time that counsel may request it. Proceed with the examination.

By Mr. Hinds:

Q. Mr. Sprague, a little more as to your qualifications. What has been your formal education?

A. Well, I am a graduate chemical engineer and
2574 have the degree of master of science in chemistry.

Q. You have had a diversified industrial experience?

A. Yes sir, I have been in charge of sales of the paint department of The Glidden Company in the East, have been a chemist in the laboratory, have been purchasing agent, and have had the various positions that are described in my earlier testimony yesterday in connection with lead pigments.

Q. I think you said that the lead pigments industry is a very small factor, relatively, in Glidden's business and in your experience, is that true?

A. The lead pigments business is a small part of the

Glidden Company's overall sales, but my experience in it has been a large part of my business experience.

Q. Has your experience included any f.o.b. uniform plant prices in any produet?

A. Did you say uniform f.o.b. plant prices?

Q. Well, I mean a price which, considering the same grade and quality and quantity of goods is the same to each purchaser f.o.b. your plant—that is what I meant by being uniform.

A. Yes. One of the lines that our company handles and which I have had sales responsibility for, embodies sales on an f.o.b. plant basis.

Q. Has your experience covered both multiple plant production and single plant production?

A. Yes, it has, particularly in the pigments business.

2575 Q. Has your experience required you to keep informed as to the marketing practices of other producers than the one by whom you were at any given time employed?

A. Oh yes, it is constantly necessary, in connection with handling sales of raw materials, tonnage raw materials of the type that I speak, where those materials are in competition with others that may be alternately used, to keep very closely in touch with competitive developments.

Q. Will you give us the benefit of your judgment and informed opinion with respect to any difference that may exist between the position of a single plant producer and a multiple plant producer where prices are f.o.b. plant?

Mr. Wright: Objection. It is immaterial and irrelevant and is not a proper subject of this sort of testimony.

Trial Examiner Norwood: That is the type of question that is asked of economists.

Mr. Hinds: Don't you think that I have qualified this gentleman as an economist to the extent that he is a marketing, pricing and producing expert in the field in which he is engaged? He certainly knows the difference between the position of a single-plant producer and a multiple-plant producer. Otherwise he wouldn't be occupying the position he does, and his company would have gone out of business.

Mr. Wright: The fact that this gentleman is a vice president of The Glidden Company who has been in 2576 their employ for many years, doesn't qualify him as

a marketing expert to speak on such broad and general subjects as counsel has asked him about.

Mr. DuBose: He has already stated that his own personal experience includes single plant operation.

Mr. Wright: The question was very vague and general. It related to no product and there were no circumstances given in the question except a one-plant operation and a multiple-plant operation.

Mr. Hinds: If that is the only objection, I will be glad to reframe the question. It seems to me that these go to the weight rather than to their admissibility.

Trial Examiner Norwood: I will sustain the objection, but you may ask this witness to give the conditions in his business upon which an economist might base an opinion, and you may ask him his reasons, his practical reasons, why he sells this way or why he sells that way, based upon the requirements of his particular business.

Mr. Hinds: That will be quite satsifactory; that is really what I had intended to do.

By Mr. Hinds:

Q. Mr. Sprague, in your lead pigments business will you state the difference, if any, between the single plant producer and the multiple plant producer, with respect to f.o.b. prices?

Mr. Wright: Objection, Your Honor.

2577 Trial Examiner Norwood: That is the same question, isn't it?

Mr. Wright: It has already been brought out in the record that the company for which this witness is an executive is a single-plant producer as to each of these pigments involved, and he has not been qualified to speak of the operations of the multiple-plant producers.

Mr. Hinds: I think counsel fails to recollect that I particularly asked him if it had been part of his business to keep himself informed about the multiple-plant producer, whether his own company or the others—and in lead pigments it would be others of course—and he said that it had been part of his business to keep himself informed about marketing practices and conditions of competing multiple-plant producers. So I think, while Your Honor may have a different view from ours as to the weight of this testimony, certainly its admissibility, I submit, has been established because it is within the sphere of his knowledge.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Mr. Sprague, in your lead pigments business will you state the difference, if any, between the single plant producer and the multiple plant producer, with respect to f.o.b. prices?")

Trial Examiner Norwood: That is an economic
2578 question pure and simple. I think you can bring out the factual basis for such questions as that from this witness and then we can go into that with qualified experts.

By Mr. Hinds:

Q. Having in mind, Mr. Sprague, the conditions in the lead pigments industry that you have observed, including the fact that some of your competitors have more than a single plant, why have you not adopted an f.o.b. pricing system?

Mr. Wright: Objection, Your Honor. This witness has already testified that he took the prices of the market leader as he found them and attempted to compete on that level; and he has already testified that the Glidden Company has never been in a position to initiate a price change on these lead pigments, has never felt itself in a position to do so. Now this is an attempt to bring out testimony inconsistent with his previous answers.

Trial Examiner Norwood: Well, he may correct his testimony or qualify it in any way he wants to, or confirm it.

The Witness: Your Honor, may I speak to our counsel, please?

Trial Examiner Norwood: No.

Mr. Hinds: Was there a ruling on that objection?

Trial Examiner Norwood: The objection is overruled.

Mr. Hinds: Please read the question to the witness, Mr. Reporter?

2579 (The reporter read the question, as follows:

"Q. Having in mind, Mr. Sprague, the conditions in the lead pigments industry that you have observed, including the fact that some of your competitors have more than a single plant, why have you not adopted an f.o.b. pricing system?")

Trial Examiner Norwood: Answer the question.

The Witness: We have not adopted an f.o.b. plant basis of pricing either in white lead or in lead oxides, be-

cause by doing so we would automatically circumscribe ourselves and make an isolated island of ourselves in the geographic area where our plant is located, and that would be fatal for our particular situation at the location point of these plants, more seriously with respect to the lead oxide plant at Hammond, possibly, than with respect to the white lead plant at Noranton. I have found that the trade relations aspect of f.o.b. selling pigments is the same whether you sell white lead or whether you sell lithopone or titanium oxide. I have been in charge of sales of lithopone from multiple producing plant points to the same classes of customers as I have sold white lead and red lead to from single producing plant points. I learned early in the white lead business, in respect to the sale of dry white lead now—the factors I am mentioning do not pertain, in my opinion, particularly to the white lead-in-oil sales which end at a different class of consumer—but I learned
2580 fundamentally that our trade relations and our customer relations with the people who purchased our lead pigments and our zinc pigments, and our titanium pigments, were much happier when those purchasers all knew that they paid us the same price for our goods laid down at their door, ready for their use, than they were when we sold merchandise under my direction from a single producing plant on an f.o.b. plant basis, where each consumer had for himself a different cost for our merchandise when he started to use it.

I learned throughout my experience that it was a sounder position for a seller of bulk raw materials to be in, who was selling a product that the customer processed and used in preparing the article that he ultimately exposed for sale, to have those customers each know that I was selling them on the same basis. They had no quarrels then between themselves and no quarrels with me.

Now in selling mixed feeds, which is one of my present responsibilities with The Glidden Company, which is sold on an f.o.b. plant basis out of a single producing plant, one of our problems today in that business—which has been one of the first large businesses in this country to encounter the drop-off in volume that we will all hit some of these days, and which we have had in the feed business for the past six months—is that the volume in the industry
2581 has dropped off about 45 per cent. Now what has happened to us in our single producing plant with an

f.o.b. plant basis of pricing? What happens is that our market area begins to contract and it is measured solely by the freight rate from our plant out, and from the other fellows's plant in, and the actual thing that has happened and is now happening in that business, our business, the Glidden Company's business there, is that whereas we for some years merchandised that material in the New England States, in Delaware, Maryland and Virginia, we now find our area constricted to within two or three states around our plant. Now that is the actual fact of what happens, and we are going to have to operate that business now profitably on sales within that area closely contiguous to the point of production.

Now the serious thing about that to my view, and it applies very particularly to the pigment business, is that since competition is an inherent urge in men and business, they have to compete somewhere on something, so if they can't compete on quality, which is the result when a uniform delivered price to the customer is in effect, competition then changes from price competition to quality competition, to competition on service, to competition on factors other than price, and that is, to my way of thinking, wholesome throughout. But when that type of competition ceases, and competition takes other forms, then the benefit of improvements in quality, the urge to conduct re-
2582 search, and the desire of demonstrating to your customer something superior for him, becomes secondary.

Now we find in our f.o.b. plant pricing point plant that our energy is now centered not on improving the quality of our merchandise, but our energy is now centered on getting low cost transportation out of that plant so that we can reach further out and have a delivered cost to the buyer now that is in competition with the other fellow who can reach him. What will be the effect? I don't know. We may have to acquire some truck lines and go into the transportation business in order to expand that market. The pressure of competition changes from that of quality, on a uniform delivered price method of pricing, to other phases of the business than quality of merchandise, and that, I think, is serious.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2583 By Mr. Hinds:

Q. Mr. Sprague, has Glidden Company and other producers of lead pigments any competitors outside of the field of lead pigments?

A. White lead is a white pigment, and it must compete with other white pigments in trade acceptance and use in the paint industry, which is the largest consumer of white pigments. There is always a relationship between the various white pigments.

The ceiling of one is related to the ceiling of another in terms of the price that the paint manufacturer can pay for those pigments. I don't want to mislead you by indicating that the relationship is entirely one of cost between the white pigments because there is, in addition to the cost relationship, factors that relate to the properties and characteristics that the various white pigments possess, and those are unique to the individual pigments.

Q. What are some of the other pigments other than lead pigments which compete within the limits you mention?

A. In the case of white lead, the competing pigments are lithopone, zinc oxide, titanium oxide and, most importantly, leaded zinc oxide.

Q. Are any of those competing pigments used by concerns other than those that are named as respondents in this case?

A. Oh, yes.

2584 Q. Name some of them.

A. The New Jersey Zinc Company, the Dupont Company, the Titanium Pigment Company, the American Cyanamide Company, St. Joseph Lead Company. There may be others, but I recall those.

Q. When you refer to the St. Joseph Lead Company, are you referring to its production of pigments other than lead pigments?

A. I am referring to zinc oxide.

Q. You said, I believe, you were a member of the White Lead-in-Oil Committee of the Lead Industries Association.

A. I don't recall that I ever said so, but I was.

Q. You were?

A. Yes, sir.

Q. I thought it had already been brought out. Did you attend the meetings of that Committee?

A. Yes, sir.

Q. What was the purpose of that Committee?

A. The Lead-in-Oil Committee or group was put together for the pu pose of providing means and a way of expressing the opinions and the recommendations of the white lead-in-oil industry with respect to the formulation of codes.

Q. Did that Committee even consider the fixing of prices?

Mr. Wright: I object, your Honor. It calls for a conclusion of the witness.

2585 Trial Examiner Norwood: He was on the Committee, was he not?

Mr. Wright: Yes, sir.

Mr. Hinds: Yes, sir.

Mr. Wright: But I mean it calls for a conclusion on the part of the witness, a broad general conclusion as to what price-fixing was.

Mr. Hinds: There is no ambiguity. The word "consider" is an unambiguous word.

Trial Examiner Norwood: He can clarify that, if you think it is ambiguous. Objection overruled.

Mr. Hinds: You may answe

The Witness: Not to my knowledge.

By Mr. Hinds:

Q. Did that Committee recommend that members of the Association report their prices and price lists to the Association for the use of other members?

A. My recollection is that the Committee gave consideration to the development of the methods by which price reporting could be accomplished, but that the Committee did not recommend such reporting.

Q. What were some of the methods to which they gave consideration in view of the possibility that they might recommend price reporting?

A. It was necessary in attempting to develop

2586 means by which price reporting could be done to design the manner in which the prices were to be named, and in such a manner that they could be reported and could be understood by those receiving the reports.

Q. What were suggested as possibilities for discussion as a means of making this price reporting feasible?

A. One of the difficulties, as I recall it, in trying to develop a system arose from the fact that there were so many price equalization or freight equalization points, and

as a means of trying to improve that situation for reporting purposes, or to make it intelligible, the consideration of the zones was inaugurated.

Q. Well, when the Committee decided that it would not recommend price reporting at all, what, if any, action was taken with respect to this zoning suggestion?

A. None.

Q. I show you what appear to be the minutes of the Lead Pigments Division, White Lead-in-Oil Committee, of August 9, 1933. That is in evidence as Commission's Exhibit 501-A to -D. Without consulting these minutes, can you testify as to whether you were present or what occurred there, or do you require this to refresh your recollection?

A. No, I cannot. I attend many meetings, not only of the White Lead-in-Oil Committee but of the others.

Q. Please refresh your recollection and tell us
2587 whether you were present there.

Mr. Wright: Your Honor, I object to that. How can the minutes refresh his recollection as to whether he was there or not. He either recalls being there or he doesn't recall being there. If his information is going to be from the fact that the minutes said he was there, it isn't his own recollection.

Trial Examiner Norwood: You look at the minutes there and see if you recall by seeing the matters recorded there, see if it brings the whole picture of that meeting back to you and then lay aside the minutes and tell us what you remember about it.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Lay the minutes aside, and then answer the question.

By Mr. Hines:

Q. Do you recall whether at that meeting there was any reference to the possibility—

Trial Examiner Norwood (Interposing): Do you remember that you were present at that meeting?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Hines:

Q. A moment ago you referred to minutes which
2588 were discussed for possible if you should decide, your Committee should decide, to recommend price report-

ing. Do those not refresh your recollection as to what particular means discussed in the contingency that you should adopt price reporting?

A. Yes, they do.

Q. What?

A. The means that were required in that Committee and in all the other committees where we were attempting to develop a basis of price reporting was just that—to get a basis that was intelligible.

Now, my recollection of that meeting, as refreshed from the minutes, is this, that in order to get a basis for the reporting of prices for white lead-in-oil, it was necessary to know what the prices were and where they applied, and there were a huge number, a large number of freight equalization points that had come into being in that industry, and there wasn't any practical way that I can recall, and as far as that meeting and discussions, as to how price reporting could actually be accomplished with all of the equalization points.

Q. Were there any suggestions made—

A. (Interposing) Mr. Maston pointed that out, or it was pointed out in the meetings, just as the minutes state, and he undertook to try to make some recommendations.

2589 Q. Do you remember what they were?

A. Recommendations to solve the problem. Yes, sir, I remember this, that he developed a map. I remember seeing more than one map that he had in the course of that work, and he had the various areas of the country in colors as a means of simplifying a method or producing a method by which cost reporting would be intelligible and would be simple.

Q. Do you remember whether or not he was a proponent of having zone maps or that he merely raised it for consideration and discussion?

A. I would presume he was a proponent of it, as he volunteered to make some suggestions, but I do not recall any strong position on the matter that was taken by any members of the Committee.

Q. I show you Commission's Exhibit 513-B. Did you receive a copy of that letter, or does that refresh your recollection concerning any matters referred to therein?

A. Yes, sir, I received a copy of that.

Q. I notice that refers to a map. What was the map referred to therein by Mr. Maston?

A. I don't know what map it was except it was one of the maps that he prepared in connection with this work of the Committee. I paid no attention to the map because there wasn't anything I could do about it.

2590 Q. What, if any, action or decision or conclusions was reached by the Committee with respect to that or any other map?

A. My recollection is that there were no conclusions reached by the Committee, but the thing dropped out because the whole price reporting idea was abandoned.

Q. Did Glidden ever have or use a map, a so-called zone map, as far as you know?

A. No.

Q. You referred to these equalization points and differentials. Did you discover them to be in existence when you first entered the industry, or were they something that grew up after you came in there?

A. They were in existence when I first became familiar with pricing white lead-in-oil.

Q. Did you observe any change in these practices in that regard which developed only during the N.R.A. period or for the first time during the N.R.A. period?

In other words, did you observe any change in that regard following the enactment of the N.R.A.?

A. Our sales reports and information were that the use of premium prices on deliveries of white lead-in-oil at distant points instead of by equalization points, but by zones, occurred in the trade—I do not recall just when, but I think after the N.R.A. period.

2591 Q. What, if anything, did Glidden do in that connection after the N.R.A. was declared unconstitutional with respect to quoting differentials?

A. Glidden continued all through its period in the white lead-in-oil business of adjusting itself to its competition, whatever it was.

Q. Did you at any time consciously follow or feel restrained by any zone differentials or zones as such, or was your naming of prices at different points merely a matter of discovering what your competitors were doing?

A. We discovered what our competitors, and we initiated competitive pricing in accordance therewith.

Q. I show you what appears to be a mimeographed paper marked "Commission's Exhibit 593" and ask you if you have seen that before or know what it is.

A. Yes, I testified regarding that at the hearing in Cleveland.

Q. What is that?

A. That is a sheet taken from a bulletin that was issued by the paint divisions of the Glidden Company relating to white lead-in-oil pricing dated October, 1941.

Q. Now, did you give the original of that exhibit to anyone connected with the Federal Trade Commission?

A. Yes, my recollection is that I gave it to Mr. Dunn.

Q. When was that—about?

2592 A. I do not recall the time. It was the time he came to Cleveland to call on me in connection with matters relating to white lead-in-oil prices.

Q. Did he at that time or any other time ask you for a zone map?

A. He may have. I do not recall specifically that he asked for a zone map, but he asked me what were the prices of the Glidden Company on white lead-in-oil and how they might be defined, and in connection with answering his question I gave him that sheet.

Q. That Exhibit 593 that you just mentioned? You gave him No. 593?

A. Yes.

Q. Did you tell him that since 1935 Glidden had adopted National Lead Company's differential zones or anything to that effect?

A. No, I don't think I told him Glidden had adopted National Lead zones in 1935. I don't believe that was the case. What Glidden was to adjust to the competitive practices of the National Lead Company as they found them.

Q. Did Mr. Dunn in your presence write on the top of Exhibit No. 593 the lead pencil words, "Since 1935 adopted National"?

A. I do not recall his writing anything.

Trial Examiner Norwood: May I see that a minute?

2593 (Book handed to Trial Examiner.)

Trial Examiner Norwood: Thank you.

By Mr. Hines:

Q. Did you at anytime have any understanding or arrangement with National Lead that from 1935 you would adopt their differential zones?

A. No, not from 1935 or any other time.

Q. Did you ever discuss the matter of your adopting

their differential zones with any representative of National Lead Company?

A. Not that I know of.

Mr. Hines: You may cross-examine.

Mr. Wright: Your Honor, it is almost 12 o'clock. I suggest we recess for lunch.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Please proceed, Mr. Ewing.

Cross-Examination by Mr. Ewing.

Q. Mr. Sprague, I show you the original document, a photostatic of which has been marked "Respondents' Exhibit 138-A, and ask you to read it to yourself.

Were you present at that meeting, Mr. Sprague?

A. Yes, sir.

Q. Do you recall discussion with respect to the 2594 question of establishing zones in the South and West at that meeting?

A. Yes, I do.

Q. Will you state whether the members of the Lead Oxide Committee of the Lead Pigments Division of Lead Industries Association—I withdraw that.

Will you state in what connection the subjects considered at the meeting of the Lead Oxide Committee of the Lead Pigments Division of Lead Industries Association, Respondents' Exhibit 138-A and subletters, were given consideration?

A. Could I have that repeated, please?

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: I cannot recall much, if anything, about the duration of that meeting or length of discussions. I do recall the general character of the points that those minutes portray in connection with the Committee.

By Mr. Ewing:

Q. I think you may have misunderstood me. What I meant to ask you was: For what purpose did the Committee consider the subjects? What brought up the consideration?

Mr. Wright: Objection, your Honor. He has already testified that he can't recall this particular meeting.

Mr. Ewing: He didn't say that.

Mr. Wright: Read the witness' last answer.

Trial Examiner Norwood: Let the witness explain.

2595 there whether or not he does recall the meeting.

The Witness: Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: He says he does recall it. I think that makes the question valid. Do you want the question read?

The Witness: I have answered the question.

Mr. Ewing: There was an objection.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: Those meetings were all held, that one and all the rest of them, for the purpose of considering the development of the code work of the N. R. A.

By Mr. Ewing:

Q. Now, will you tell us whether members of the Lead Oxide Committee, meeting as such, ever agreed on the establishment of zones, which subject was discussed at this meeting of December 27 and 28, 1933?

A. Not to my knowledge.

Q. Will you tell us, if you know, whether at any period subsequent to this meeting and prior to the effective date of the code in June, 1934, the members of the Lead Oxide Committee ever agreed on the establishment of zones?

A. I know of no agreement among the members

2596 of the Lead Oxide group at any time on zones.

Q. Did you ever hear of any agreement?

A. No, sir.

Q. I direct your attention to the last paragraph of the minutes, Respondents' Exhibit 138-A, and ask you to look at Article II of Schedule A of the Code of Fair Competition for the Lead Industry, Commission's Exhibit 809.

Does Article II of Schedule A include the basis for sale at differentials referred to in the minutes of the meeting of December 28, 1933, Respondents' Exhibit 138?

I direct your attention particularly to paragraph (b) of the article, subparagraph (5), subparagraph (a).

A. I understand that. This schedule A defines how sales at a differential are to be conducted. I don't know what

you mean exactly by a basis of sale, but says nothing about the differential, if that is the point you mean.

Q. What I meant was that the minutes referred to a discussion with respect to a basis for sale at differentials in connection with the consideration being given the code by the Lead Oxide Committee.

A. That is right.

Q. In the code we find this provision of Article II, which I have made reference to, paragraph (b), subparagraph (5), subparagraph (a). My question was—I believe you answered it—if that provision of the code was the
2597 basis of sale at differentials theretofore generally discussed and eventually finding its way—

Mr. Wright: Objection, your Honor. Counsel has characterized what appears in these minutes and has put a lot of conclusions in his question, obviously in an attempt to lead the witness.

Mr. Ewing: I haven't characterized it at all.

Mr. Wright: There is nothing in the minutes that this thing in the last paragraph had anything to do with. It was stated in that that it wasn't to be filed with the code.

Mr. Ewing: The whole subject of discussion, according to this witness, and according to Mr. Wormser, was all with reference to the code.

Now, this particular reference in these particular minutes, as Mr. Wright said—there was no need for filing it with the code. That was the judgment of the Committee at that point. I have tried to bring out, and I believe I have brought out from Mr. Sprague, that when the code appeared in final form, it did include a provision relating to sale at differentials over lead in the case of lead oxides; and I simply want to show that provision did go into the code even though by that December 27 and 28, 1933, meeting the Committee then apparently felt no necessity for such a provision.

2598 Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: Please restate the question.

By Mr. Ewing:

Q. Was a basis for sale at differentials over lead in the case of lead oxide the subject of a provision in the code as finally adopted?

A. Yes, sir.

Q. What provision in the code, Schedule A, contains such a provision?

A. It is contained in Schedule A, Article II, paragraph (5) with its subparagraphs. That was the result of the consideration given to the question by this Oxide Committee at some length.

Q. Will you state whether you had anything to do yourself with the drafting of that provision of the code?

A. Yes, I think I drafted it.

Mr. Ewing: I have no further questions.

Mr. Wood: Your Honor, I have just one question.

Trial Examiner Norwood: Very well, proceed.

Cross-Examination by Mr. Wood.

Q. Mr. Sprague, in your testimony with respect to the sale of lead-in-oil you used the term "freight equaliza-
2599 tion points", didn't you?

A. Yes, sir.

Q. Will you explain thoroughly just what you meant by freight equalization points as you used the term in your testimony?

A. As I understand that term, the meaning of the freight equalization point meant that white lead-in-oil sold with respect to that freight equalization point would be charged to the buyer at the base price in effect otherwise, plus the freight cost from the equalization point to that buyer.

Q. In what sense do you use the term "base price" there?

A. I used the base price in this sense, that as I recall those schedules, the published price of white lead-in-oil or the card price was what I used as the base. Then a purchaser at a distant point would be charged the base price and an added charge in respect to that equalization point. It is a little complicated, and it has been some time since I have analyzed that.

Q. Why do you characterize it as complicated, Mr. Sprague? I am just trying to get on the record a complete statement of the system.

A. I think I have given you about as complete a statement of it as I can.

Trial Examiner Norwood: What would be added to the base price for the ultimate price which the purchaser pays?

2600 The Witness: I will need to use an illustration to explain my recollection of that. Is that satisfactory?

Mr. Wood: Surely.

The Witness: Assuming that the base price of white lead-in-oil was 12 cents and the sale was made in Boulder, Colorado, and the freight equalization point was Denver, and the premium applicable to Denver was 1/8th of a cent, then my recollection is that the buyer in Boulder would pay the 12 cents plus—He would be equalized at Denver at 1/8th, plus 1/8th of a cent, plus freight from the shipping point equalized at Denver.

By Mr. Wood:

Q. Did you use the term "Differential point" in your testimony in regard to that method of pricing white lead-in-oil?

A. I may have used the term "equalization point" as well as "differential point."

Q. What was the differential point?

A. The differential point was the destination point at which a certain premium applied to the price from the base.

Q. In figuring the price of any given commodity at any given point, was considerable computation necessary in those days?

A. Yes, the computation was not a severe problem. The real problem was to find out where these equalization
2601 points were and which they were from the standpoint of the Glidden Company now.

Q. Were they the same for all companies—equalization points?

A. I can't answer what the siuation was for all companies. My knowledge of this situation rests upon what Glidden discovered concerning the practices of National Lead and Glidden's efforts thereafter, but I can say that our observation was that in general similar competitive prices were quoted by others.

Mr. Wood: That is all.

Mr. Hinds: No further questions at this time.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

(Whereupon, at 12:10 p.m., E.D.S.T., a recess was taken until 2:00 p.m., E.D.S.T., of the same day.)

2602 Afternoon Session.

2:00 p.m. E.D.S.T.

Trial Examiner Norwood: The hearing will come to order.

Proceed with cross-examination.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Sprague, I show you some documents, and ask you if these are the documents from which you prepared Respondents' Exhibit 143?

A. Yes, sir, those are the source material that my assistant used in respect to the graphs for dry white lead prices and white lead-in-oil prices, but not for the pig lead prices. This book (indicating) is the source of the data for the pig lead prices.

Mr. Wright: I request the reporter to mark for identification as Commission's Exhibit 856 and sub-numbers, the sheets purporting to be from the American Paint Journal Convention Daily of October 26th and 28th, 1938, and the Convention-at-Home Daily of October 31, 1944, being pages 36 and 38 of the Convention-at-Home Daily, and pages 20 and 24 of the American Paint Journal Convention
2603 Daily. I also request that the reporter mark for identification as Commission's Exhibit 857, page 497 of the book entitled, "Metal Statistics—1945" published by the American Metal Market.

(The papers referred to were marked Commission's Exhibits 856-A, 856-B, 856-C, 856-D and 857 for identification.)

Mr. Wright: I would like to request counsel, if it becomes necessary to introduce these into evidence, that we have an agreement that photostate be substituted for the originals, and the originals can then be returned to counsel.

Mr. Duncan: It is so understood. We have no objection to that.

By Mr. Wright:

Q. I show you documents marked for identification as Commission's Exhibits 856-A to D, inclusive, Mr. Sprague,

and ask you if those are the source material from which were prepared the graph lines A and B appearing on Respondents' Exhibit 143?

A. Just a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. What was your answer?

A. May I have the question again?

(The reporter read the question as follows:

2604 "Q. I show you documents marked for identification as Commission's Exhibits 856-A to D, inclusive, Mr. Sprague, and ask you if those are the source material from which were prepared the graph lines A and B appearing on Respondents' Exhibit 143?")

A. Yes, sir.

By Mr. Wright:

Q. I show you a document marked for identification as Commission's Exhibit 857, and ask you if that is the source material from which line C in Respondents' Exhibit 143 was constructed?

A. Yes, sir, that is the source material which my assistant used in preparing that.

Mr. Wright: Your Honor, I offer Commission's Exhibits 856-A to D, inclusive, and 857, in evidence for the limited purpose of showing the source materials and the manner of constructing Respondents' Exhibit 143, and not as evidence of the truth of any matters that appear therein.

Mr. Duncan: No objection.

Mr. Hinds: No objection.

Trial Examiner Norwood: Received for the purposes stated.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 856-A, 856-B, 856-C, 856-D, and 857, were received in evidence.)

By Mr. Wright:

2605 Q. I call your attention now to Commission's Exhibit 857, and to the statement appearing at the top thereof, "Monthly Average Prices of Pig Lead—New York Delivery, based on American Smelting & Refining Company's quotations—50-Ton Lots". Do you consider that that accurately reflects the market of pig lead?

A. Yes, I always regarded the quotations of the American Smelting & Refining Company as most accurately reflecting the pig lead market of any current quotable figures.

Q. Then for the purposes of this chart, you accepted as the going price of lead the quotations of the American Smelting & Refining Company, is that correct?

A. We used in that chart the figures taken from the Metal Statistics book, and used those believing that they adequately reflected the pig lead market for the purposes of the chart.

Q. Now I call your attention to Commission's Exhibit 856-A under the heading "Ten Years' Prices of Some Raw Materials—White Lead, Basic Carbonate—Dry Casks, Per Lb.", and to the fact that under each year there appear two columns, one under "H." and one under "L." What is the significance of the two set of quotations each year?

A. Those figures are, as stated in the title here, the monthly high and low prices during each month for these materials.

Q. Do you know to what class of customers those 2606 were prices as of that time? Were those the retail list prices; were those wholesale prices; were those selling prices of the pigments manufacturers in carloads, or less than carloads; or what prices were those?

A. These are stated here to be the monthly high and low prices of products used in paint and varnish manufacture.

Q. Do you know whether those prices are the lowest prices quoted by the pigments manufacturers or the highest prices quoted by them on those products to particular classes of trade?

A. When we sought to find material with which to prepare those graphs, I referred to this compilation because I had recalled, in previous years, that it was the habit of the American Paint Journal to show these ten-year averages. I know of nowhere else that I might secure that, and we accordingly used this information as—

Q. (Interposing.) Mr. Sprague, do you understand my question? I asked you to what class of trade that price was applicable as it appears there.

A. I will answer that this way. We know nothing about the origin of these quotations except as they are stated here to have been compiled by the Eastern Market Editor, and so forth. Beyond these figures we have no knowledge.

Q. As far as you know they could be, then, the keg price on dry white lead in 100-pound kegs to consumers, or they could be the carload price to manufacturers?

2607 A. If they were prices of that type, and in such packages, and for such consumers, then they would violate the subject of the prices as they are shown and would not meet the title shown on the table.

Q. What is the title there?

A. The title here says that these are the "Monthly High and Low Prices of Major Products Used in Paint and Varnish Manufacture—Compiled by Maurice W. Butler, Eastern Market Editor, American Paint Journal Co."

Q. But you don't know exactly to what class of trade those prices are applicable of your own knowledge, do you?

A. Of my knowledge we know nothing more than the title and the printed figures.

Q. Now I direct your attention to the fact that Respondents' Exhibit 143, in line B, Basic Carbonate Dry White Lead, is explained as monthly average price. Is there a monthly average price reported in the American Paint Journal, Commission's Exhibit 856-A?

A. No. The price shown here is high and low, and in the great preponderating number of months for which these prices are shown there is no difference between the high and the low. Where there was a difference in a given month, I told Mr. Stadder, my assistant, to use the average of those two figures.

Q. So that was a simple arithmetic average of the high and low?

2608 A. That is right.

Q. It didn't refer to the length of time at which one price might have obtained during the month? For instance, the high price might have obtained one day during the month, for all you know?

A. That is right, it was a simple arithmetic average, and that was satisfactory to me.

Q. It didn't reflect, so far as you know, though, an actual average price at which those products were sold during that month?

A. No. Such an actual average price would have been impossible to obtain on our part, or indeed on the part of anybody else, without knowledge of the tonnage of products that were sold from day to day.

Q. Would it not be a more accurate figure if there were

in the basic data the length of time in the month at which each the high and the low price obtained?

A. Not unless the basic data also showed the volume of materials sold each day at those respective prices. This was the most accurate source of information and the most accurate information that I knew of to find for this purpose.

Q. Is that more accurate than would have been the records of the Glidden Company as to what they sold dry white lead for during these periods?

A. Those figures are not The Glidden Company's
2609 prices at all. Those are the market prices reported there. Glidden could have secured, if their sales records by months, and so on, still existed, a precise, actual average. But I was not using Glidden's prices in the chart.

Mr. Wright: Your Honor, I move that Respondents' Exhibit 143 be stricken from the record, on the ground that the figures have no value or relevancy. As has been stated by this witness, it was a simple arithmetic average taken from data which showed a high and low price during the period, and there is no indication in the basic data as to the class of customers or what price was being calculated; and it is already in the record that there are different prices for different classes of trade in different quantities and in different containers as to these various products which are covered by it.

Trial Examiner Norwood: Is that tabulation supposed to cover all classes of customers?

Mr. Wright: The witness has stated that he doesn't know what those prices are that appear in Commission's Exhibit 856-A, which has been stated by him to be the sole source of information of the material which is in Respondents' Exhibit 143.

Trial Examiner Norwood: Will you answer my question?

The Witness: May I have that again, please?

Trial Examiner Norwood: Read my question to the witness.

2610 (The reporter read the question as follows:

"Trial Examiner Norwood: Is that tabulation supposed to cover all classes of customers?")

The Witness: The tabulation states that it covers prices of dry white lead in casks. My recollection is that whenever dry white lead prices were quoted in casks in the New York or other publications that showed white lead prices,

they referred to the price in barrels or casks, and that was the type of package and represented the type of price that pertained to the sales of dry white lead when made to the paint manufacturers and other large consumers.

Mr. Hinds: Before Your Honor rules on this motion, I would like to have an opportunity to further examine this witness on the identification of the document.

Trial Examiner Norwood: Yes.

Mr. Hinds: Mr. Sprague, you say that the only purpose of this graph was to show in a general way, over the years, the parallelism of the pig lead price, market price, to the price of the lead pigments referred to in the graph; is that right?

The Witness: That is correct; and also to show, as I testified, the general similarity over these time intervals of the situation portrayed in the chart I first kept myself by daily records.

Mr. Hinds: By contrast to the earlier exhibit 2611 which showed up to 1929 the daily market prices, you show here the monthly averages, is that right, rather than the daily prices?

The Witness: In this chart the monthly average, arrived at as described.

Trial Examiner Norwood: For that average you take the high and the low. Did you just divide that by two to get the common factor?

The Witness: I would like to call your attention, Your Honor, to this data. You will notice there that the figures given under the headings "H." and "L." are, in the preponderating number of months, the same, which meant undoubtedly that during those months there was no change in the price and the high and the low were the same. As I stated, during those months where there was a difference between the high and low, I instructed my assistant to take the arithmetical average and so use it in the graph, that being the most accurate available method to me to arrive at what the average was.

Mr. Hinds: Now, Mr. Sprague, I will ask you, in your opinion, in view of your experience, assuming it had been humanly possible, in those months where the price did change and where the high was different from the low, if you had been able to learn the tonnages and the periods where these different prices occurred and had been able to reflect that onto your graph, whether the difference be-

tween that and what you have given us would be visible to the naked eye on the graph?

2612 The Witness: I doubt it.

Mr. Wright: Objection, Your Honor. That calls for a conclusion.

Mr. Hinds: That is what I am asking for.

Mr. Wright: It hasn't been stated that he had any means or way of making such a weighted average, so how is it possible for him to make such a conclusion?

Mr. Hinds: It seems that it is possible.

Trial Examiner Norwood: You may cross-examine him on that.

Mr. Hinds: I haven't quite finished, however.

Trial Examiner Norwood: Go ahead.

Mr. Hinds: You were asked what would have been the situation had you been able to get Glidden's prices for the corresponding product that appears in one of the lines of your graph—

Trial Examiner Norwood: (Interposing.) That question doesn't go to this motion here, I don't think. I think you are just referring to some of his evidence. Let's postpone that for re-direct.

Mr. Hinds: Well, the purpose of my question was prefatory to Your Honor's ruling on the motion, by way of redirect examination with respect to the preliminary cross-examination directed solely t that purpose. That is all I had in mind. It wasn general.

2613 Trial Examiner Norwood: Go ahead.

Mr. Hinds: I will rephrase the question in this way. Were Glidden's prices, at the time you prepared that chart, available to you for more than a few years back, their sales records?

The Witness: No, sir.

Mr. Hinds: Do you know about how far back they were available?

The Witness: I haven't the least idea.

Mr. Hinds: In your judgment, from your experience in the business, would it have been practicable to have prepared that portion of your chart on the basis of Glidden's sales records?

The Witness: It would have been meaningless. My purpose was an entirely different one in preparing the chart.

Mr. Hinds: Do you know of any source of data or any

method of graphically demonstrating the fact that you hope to demonstrate, better than this means or as good as this means or as accurate as this means?

The Witness: I have already stated that that was the only and the best source I knew of to get the information.

Mr. Hinds: If Your Honor please, regardless of the weight of this testimony, as to which honest minds may perhaps differ and which will be the subject of argument later, it seems to me that by a considerable margin, in this sort of a proceeding, we have demonstrated that it
2614 is entitled to be admitted in evidence for what weight it may have, in considering the limited purpose of it, which is to prove trends over a long period.

Mr. Duncan: Your Honor, in opposing the motion that has just been made by the Commission counsel to strike from the record Respondent's Exhibit 143, I submit, on behalf of Glidden, that the motion should be denied, first, for the reason that all of this goes to weight rather than to admissibility; and second, because I think it is apparent to Your Honor that The Glidden Company has not only complied with the suggested procedure made by you earlier in this proceeding, to give to the Commission's attorney whatever material we had in our possession which in any way related to this particular exhibit, but Mr. Sprague has testified that it was the best available source that he could find.

Now were not these particular exhibits—Commission's Exhibits 856-A and B, which were printed in 1938 long before the complaint was ever filed in this case—in evidence, I would say that there would be some reason for the Court to strike from the files this particular exhibit.

Trial Examiner Norwood: I shouldn't strike it on the ground that you hadn't furnished the supporting data, but the reason for making the supporting data available was in order that opposing counsel might examine it and verify the other and see whether or not the exhibit has evidentiary value.

2615 Mr. Duncan: And we submit that it does have evidentiary value.

Mr. Wright: Your Honor, it is plain, in spite of the statements that the witness has made about this, that he knows absolutely nothing more about the sources of these figures which appear in this Journal than appears on the face of the Journal. He obviously does not know from

whom the figures were obtained or what the figures mean. He doesn't know as to white lead-in-oil, which is quoted at per pound New York, what price that is, whether it is a dealer price, a retail price, an agent's price, or whether it is a manufacturer's selling price. The same is true of white lead basic carbonate from which it comes.

Now they have constructed Respondents' Exhibit 143 as monthly average prices. We see now from this basic data how that average was obtained. It is an average which has absolutely no standing statistically or any other way. It is a simple arithmetical average of two figures about which the witness knows nothing.

Mr. Hinds: He said in most cases it was a single figure.

Trial Examiner Norwood: I have looked at the exhibit, and in most cases the high and low have the same figures.

Mr. Wright: I am willing to concede that in a good many instances that is the case, but that doesn't alter
2616 the fact that it is defective in those places where there is a difference. But more important and fundamental, it is defective in that we do not know—

Trial Examiner Norwood: (Interposing.) It is not denied that these documents are what they purport to be, and that this is information that was published to the trade at the times indicated there, is it?

Mr. Wright: It is information that was reported in another trade, not this trade. This is an association journal in the paint trade. There is nothing here that would indicate that these figures are probative or recognized in this industry as being accurate or reliable figures.

Mr. Hinds: I overlooked asking him that. Thank you for reminding me. I was about to ask him, I had it in my notes.

Mr. Sprague, are these two sources which you say you resorted to in preparing these graphs, sources that are generally accepted in the industry as representing facts as accurately as can be obtained?

The Witness: The American Paint Journal is a privately-owned publication, and one of the principal if not the principally recognized trade paper of the paint industry. It has nothing to do with any trade association, to my best knowledge and belief. It is customary in the paint industry, in referring to published sources of market information, to refer to those recognized sources that
2617 are customarily and currently used, of which the

American Paint Journal is typical and one of the leaders, although not the only one. It happened that that was the only one I recalled that published these ten-year averages or figures where I could quickly get that long range of years.

Mr. Hinds: I would like to ask one more question, if I may.

Mr. Sprague, I notice that on this graph, the period of one month is only a small fraction of an inch. Would you agree with me that it was perhaps a fifteenth or a twentieth of an inch? What would you say one month was?

The Witness: Yes, about 1/16 or 1/32 of an inch.

Mr. Hinds: I will ask you to assume that in every case where the price was different during the months, you left out any change in the graph and made your graph solely on the basis of those months where the price was unchanged so that there would be no averaging at all and simply leave it out entirely. Would the curve be perceptibly different as a representation of the comparison between pig lead prices and the lead pigment prices?

The Witness: It would not interfere in any way with the trend of the curve or the direction of the curve. Theoretically there might be an occasional spot where pig lead was very active where there would be a blank.

2618 Mr. Hinds: I notice here that for two or three years, from 1933 on to well into 1935 on your graph, line A, there seems to be an absolute straight line.

The Witness: Yes, sir.

Mr. Hinds: Suppose you had left out of the months, here and there, exceptional months, would that have been appreciably different?

The Witness: That straight line was unchanged regardless of whether it was in or out, because there were frozen prices on the OPA.

Mr. Hinds: Similarly on the B line, would the elimination of those exceptional months where there were two prices have affected the curve, so far as it represented the general point that you are trying to bring out?

The Witness: No, sir.

Mr. Hinds: And is that true also with respect to the pig lead line in its general contours?

The Witness: It is true with respect to each of the three graphs.

Mr. Wright: May I have some more cross-examina-

tion, in the light of Mr. Hinds' redirect? There is one point I want to bring out here.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Mr. Sprague, I call your attention to the fact
2619 that on Respondents' Exhibit 143, on the left-hand margin, one cent per pound is approximately one-half an inch on the graph, is it not? In other words, a difference of one cent a pound up or down in the price of any one of these three articles would make a difference of approximately a half-inch?

A. Yes, a little less than a half-inch, but close.

Q. Now I call your attention to the fact that the white lead-in-oil prices are simply listed as "Per Lb., New York."

A. Yes, sir.

Q. What is the difference between the suggested retail price of white lead-in-oil and the lowest price at which the Glidden Company sells it to any customer?

Mr. Hinds: Objected to as immaterial for the purposes of this chart, which are to show trends. It doesn't make any difference—

Trial Examiner Norwood: (Interposing.) Let him answer.

A. Mr. Wright, the difference between the suggested resale price of Glidden's white lead-in-oil and the price at which it was sold to a dealer—

By Mr. Wright:

Q. (Interposing.) The class of customer to which you sell at the lowest price.

A. (Continuing.) —would vary from time to time according to the schedules. If you will pick out one
2620 of the Glidden schedules you have in evidence, we can compute the difference to get at your question.

Q. Well, can you tell us what the difference was under OPA, from the early part of 1942?

A. No, I cannot.

Q. Was it as much as 3 cents?

A. I cannot tell you what it was.

Q. You know there was such a difference between your selling price to your dealers and the suggested resale price?

A. Oh, yes.

Q. You have no idea what that was?

A. I cannot tell you what it was, no. There are many of those schedules in evidence.

Mr. Wright: Yes, I want to put my finger on one, if you will pardon me just a moment.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Let me call your attention to Commission's Exhibit 663-K, which is a price list, in 100 pound kegs under date of April 26, 1941, and the fact that your lowest price to the dealer appearing on that exhibit was 11¼ cents a pound, and your suggested retail price was 13¼ cents a pound. There is a two-cent spread. That would make approximately a one-inch difference in the levels of these lines on the chart, Respondents' Exhibit 143, as between the two—

2621 Mr. Hinds: (Interposing.) Objected to, on the ground that the materiality is not the level, but it is the comparison between two levels.

Mr. Wright: I will withdraw the question.

Now, Your Honor, it appears, first of all that this witness does not know what price was used in that publication under line A. One cent per pound makes a difference of almost a half inch. It is already established in the record that there is as much as two cents per pound difference in these different prices. So that, without establishing what prices is shown on this chart, the whole thing is absolutely misleading and valueless, it has no probative value whatever.

Trial Examiner Norwood: You have asked me to strike this as having absolutely no evidentiary value whatsoever.

Mr. Wright: As incompetent. It is hearsay.

Trial Examiner Norwood: I think that these matters that have been brought out go to the weight of this evidence, and if it appears otherwise I might strike it in the future, but it isn't clear to me—

Mr. Wright: (Interposing.) Your Honor, this witness has based a good deal of testimony on the basis of this chart. If this chart is absolutely valueless and misleading and has not been properly established as competent evidence, then properly this testimony should be stricken.

Trial Examiner Norwood: He has put it in here,
2622 and he stated the bases on which this was made. Now it is in a very good shape for you to direct any con-

trary evidence to, and I shall deny the motion for the time being at least.

By Mr. Wright:

Q. Mr. Sprague, as I recall your testimony, you first went with the Euston Division of Glidden in 1925, did you not say?

A. Yes, sir.

Q. And you remained there in that Division until 1929?

A. Approximately so.

Q. 1929 or 1930, right in that period?

A. 1929, I think.

Q. During that time your duties were devoted exclusively to the practices and problems of the Euston Division of The Glidden Company, is that correct?

A. That is correct.

Q. Now in 1930, you went with the Metals Refining Division of Glidden, is that correct?

A. I changed my residence from Scranton to Hammond, and became, in 1930 or approximately then, the Vice President and General Manager of the Metals Refining Company, and from there on I devoted my time principally to the problems of the Metals Refining Company but also, and concurrently, to the general administrative responsibility for the Euston Lead Company.

Q. You divided your responsibilities, then, in that period?

2623 A. That is correct.

Q. Between Metals Refining and Euston?

A. Yes.

Q. Did you spend a portion of your time in Scranton?

A. Yes. I made regular trips to Scranton, perhaps I should better say irregular trips, but sufficient to keep in touch with what needed to have my own attention at Scranton.

Q. Were you consulted by the succeeding General Manager as to the problems of the business at Scranton?

A. Oh, yes, I was in constant contact with the manager at Scranton, and that continued up through until 1945.

Q. Now you left the Metals Refining Division, then, in 1935, did you not?

A. That is right.

Q. And then your duties encompassed the entire pigments production and sales of the Glidden Company?

A. No, not the production. I was in charge of the sales and distribution of those products from '35 to '45, but not in charge of the production or operation of the plants.

Q. Going back, now, to the period from 1925 to 1929 when you were General Manager of the Euston Division, how was dry white lead sold to the paint trade in those days, what was the price basis?

A. The price basis of Euston dry white lead to the paint trade, as well as to other trades, was probably de-
2624 scribable as one of getting the best price we could for the product in relation to the market price of white lead dry.

Q. Now geographically, did you sell dry white lead in those days in casks on differential points or equalization points, similar to those or in any way related to those about which you testified this morning?

A. I do not recall that there were any equalization points at any time in connection with dry white lead sales. You asked your question with respect to the period 1925 to 1929?

Q. Yes, sir.

A. During that period the Euston dry white lead was sold at a stated price agreed upon with the buyer, f. o. b. Scranton, freight allowed to the buyer's destination.

Q. Wherever located?

A. Wherever located.

Q. Including the Pacific Coast?

A. No, there were no sales made—well, let's see, 1925 to 1929, there may have been during a short period in those years some sales made on the Coast, in which case the price was a delivered price to the buyer on the Coast.

Q. Based on what?

A. Based on agreement between the buyer and seller.

Q. How did it relate to your prices in the Eastern part of the country?

A. I do not recall what the relation was at that time.

2625 Q. Do you know what the selling practices—

A. (Interposing:) I do not know what the relation was there as between our Eastern and Western prices, but I do recall that the price was related to the competitive schedules on the Pacific Coast.

Q. What were those competitive schedules, do you recall?

A. They were the schedules of the National Lead Company.

Q. Do you know what they were with regard to delivery in the Pacific Coast as against delivery in the Eastern part of the United States?

A. My recollection is that the price was higher on the Coast by a quarter of a cent per pound.

Q. Do you wish that to be your testimony, then?

A. That is my recollection.

Q. Are you sure of that?

A. Yes, sir.

Q. At that time, Mr. Sprague, what were the quantity differentials applicable to dry white lead in casks?

Mr. Hinds: Do you mean Glidden's?

Mr. Wright: Yes, sir.

A. We did not have any quantity differentials at that time to my best recollection, because we were obliged to sell our product at the best price we could get. I do not recall any quantity differentials.

By Mr. Wright:

2626 Q. Well, now, as I recall your testimony yesterday, you said that when you first went with the Euston Division, that you found them with an inferior product for which they couldn't get the full market price, is that correct?

A. That is correct.

Q. That within a period of years you had improved the quality to a point where you could sell at the same price as the market leader?

A. That is correct.

Q. About how long did it take for you to reach that position?

A. It took us until the action that we took around 1936 in response to the Robinson-Patman Act aspects, when we discarded the cut in price then given to the paint manufacturers. My recollection is that from that date forward we had no differences in our price as among the different types of buyers.

Q. Then when you stated that you were not up to the market leader in that early period, were you referring to that ½ cent differential to the paint manufacturers?

A. Oh, no, in the early days our price was as much as one cent per pound below the market leader.

Q. At what period of time did it get to the point where as to other industrial purchasers than paint companies, you were on a competitive level, as you would say, with the National Lead Company?

A. That occurred, as I testified, after the Robin-
2627 son-Patman Act, I believe in 1936.

Q. No, I meant, discounting now the ½ cent differential to paint manufacturers, I believe you stated that in 1936 you were already on a level with National as to other than paint manufacturers. What I wanted to know was when you reached that level with National on other than paint manufacturers.

A. I would be unable to answer that as to the time that occurred. I can tell you the reasons why it occurred.

Q. No, I want your recollection of the time.

A. I do not recall the time.

Q. You have no rough idea of how long prior to 1936 it might have been?

A. It seems to me we had about reached that point before I left Scranton, I would guess around 1930.

2628 Q. Did you feel at that time that the quality of your dry white lead was equal to that of the National Lead Company?

A. Yes. Now bear this in mind. The quality of Euston White Lead should be discussed in terms of the type of use to which it was put. My remarks about quality have been related to the use requirements and preferences of the paint manufacturers. However, I found quickly in Scranton that my white lead, poor though it was as compared to the market leader, was perfectly satisfactory as a chemical, it was basic lead carbonate and it was pure. It lacked color and it lacked hiding power and lacked this and that that the paint manufacturers wanted, but it was a perfectly good chemical. So I discovered that people who bought white lead for use as a chemical were quite pleased with Euston White Lead once they had an opportunity to demonstrate that it would successfully function. And of those users, my first customers were the pottery people who used white lead as an ingredient for glaze, and there they didn't care whether it was the kind of white lead the paint men liked, or what, they used it as a chemical substance. And I was able to narrow my cuts in price first with respect to sales to that class of buyer, but that did not enable me to effect any change with respect to sales to

the paint manufacturers—who were the largest consumers of the product.

Q. That was, as you stated yesterday, was it, be-
2629 cause of the position of Glidden in the paint industry, rather than any intrinsic quality or lack of quality of your pigments?

A. There were two factors, both of importance. One, the one I described regarding the reluctance of paint manufacturers to go out of their way to deal with their competitor; and the second one, the question of the defective quality of the Euston White Lead for their use.

Q. Which was, as you stated, corrected by 1930 when you left?

A. No, I stated that the quality difficulties with regard to the paint manufacturer had not been completely corrected by 1930. I think it was later than that that we felt that had been accomplished.

Q. Do you have any idea when that was?

A. The only idea I can give you, sir, is that it would be some time between that date and the time that we did away with the paint manufacturers' discount in 1936.

Q. What was the effect of doing away with the paint manufacturers' discount in 1936, on your business with paint manufacturers?

A. I recall that there was no effect other than the temporary complaint from customers who had long had a preference, that they didn't like having it withdrawn.

Q. You stated that in the period in which you were with Euston there was no quantitative, no quantity differ-
2630 erntial on dry white lead, is that correct?

Mr. Hinds: I would like to have it noted that this is not cross-examination. I don't think we went into quantity differential with this witness. If you want to make him your witness I suppose we would have no objection.

Mr. Wright: At that point, Your Honor, I want to say that the direct examination of this witness covered everything in this case and a good many things in addition.

Mr. Hinds: But it particularly didn't cover that. I won't comment on the rest of the statement.

Mr. Wright: It covered discounts and marketing prices generally. I can make specific references to—

Trial Examiner Norwood (Interposing.): You covered the subject generally—objection overruled.

The Witness: Will you read the question?

(The reporter read the question as follows:

"Q. You stated that in the period in which you were with Euston there was no quantitative, no quantity differential on dry white lead, is that correct?")

The Witness: I don't believe I stated that.

By Mr. Wright:

Q. Well, I asked you if there was such a differential in that period prior to 1930, and it is my understanding of your answer that you said there was not. If I am wrong I would like to be corrected.

2631 A. Well, my answer is in the record. I would be glad to refer to it.

Q. Well, I will put the question to you again and ask you for your answer now, then. What quantity differentials were there in the period from 1925 to 1930 in dry white lead?

A. What I stated was that—pardon me, what period?

Q. From 1925 to 1930.

A. In that period we had to get the best price we could get for our white lead from each customer that we sold it to, and there were no relations that I can recall between the price that we got and the quantity that we sold.

Q. Did you offer purchasers in carload quantities a better price than you did purchasers in less-than-carload quantities?

A. We always did.

Q. You always did?

A. That is my recollection.

Q. Was that a part of your published price policy?

Mr. Hinds: Your Honor, I object to that on the grounds that the question implies there was a published pricing policy. I don't think that has been shown; I don't think there has been any such evidence.

Trial Examiner Norwood: Objection overruled.

The Witness: I don't recall that there were any prices published by Euston Lead, there may have been but I don't recall that there were. The practice we fol-

2632 lowed in pricing lead, white lead, then, when we got an inquiry or a chance to sell it, was to name a price, always with an eye to the prevailing white lead market.

By Mr. Wright:

Q. Do you know whether or not at that time the National Lead Company quoted and offered to sell to carload

purchasers at a differential under the price to less-than-carload purchasers, on dry white lead?

A. You are speaking now of a differential between carloads and less-than-carloads?

Q. Yes, prior to 1930, between 1925 and 1930.

A. I do not recall whether they did or not.

Q. Does The Glidden Company now offer a carload discount to dry white lead purchasers?

Mr. Hinds: Do you mean prior to the filing of this complaint?

Mr. Wright: I mean now.

A. I think so, but Mr. Knight can perhaps be more accurate on that than I can because I haven't seen the schedules for the last year or year and a half.

Q. Well, there is evidence in the record, I believe, that it has been customary in the period at least from 1937, on, to quote a quarter of a cent differential for purchases in carload lots on dry white lead, on the part of The Glidden Company.

A. For quite a long period of time that was done, 2633 and the cards that you have—

Q. (Interposing.) Do you know when that differential was first established by Glidden?

A. I do not recall the time. It was done as soon as competition was encountered.

Q. In other words, if the National Lead Company initiated that as a part of their regular policy, then The Glidden Company followed?

A. As soon as Glidden learned that that was the basis on which the National Lead product was available, Glidden Company's prices were made to meet it.

Q. Do you recall discussing the question of a differential between l.c.l. and carload purchases of dry white lead in any meeting of the lead industries association, pigments division?

A. Unless I could see the minutes I wouldn't recall such a discussion at a specific time, but certainly discussions of that question were a part of the overall discussions during the period of the Code.

Q. Now getting to those discussions in the Code period, I assume now you are referring to the meetings of the various branches of the Pigments Division. At those meetings did the members present discuss fully the practices which were then and had been in the past employed in marketing these various pigments?

2634 A. Well, the meetings that I attended discussed quite thoroughly all phases that related to the problems of the industry in the light of the situation in those days—everything we could think of.

Q. Did those discussions include suggestions by those present as to improvements which could be made in the marketing practices of the industry?

A. Very definitely, sir, they did.

Q. And those were full and complete discussions of those problems?

A. I can recall of no limits that were placed on anybody in those discussions.

Q. Were those people in general agreement as to many of the things which were discussed as improvements, as to the value of them in the industry?

A. Well, the history of those meetings was this, that there were many differences of opinion and as they met further and wrestled with problems they probably had the same situation as confronted General Marshall, they finally threshed them out to a point where they could agree on recommendations for the Code.

Q. This morning you described or gave an illustration of how the differential in equalization points on white lead-in-oil worked out in the period prior to 1933. As I recall it you gave an illustration of an order for delivery at

2635 Boulder, Colorado, which would take the price at the nearest differential point, plus the equalization of the freight from the shipping point to the differential point and the destination. Will you explain again how an order of that type would be priced under that method? Take again your illustration of an order at Boulder, Colorado, and a differential point at Denver.

A. Well, I don't claim to be up on the details of that, but I can repeat the illustration that I gave this morning which was that if the base price of white lead-in-oil was 12 cents, and Denver was a one-eighth cent premium equalization point, then it was my recollection that the price applicable to a sale in Boulder would be 12 cents, plus one-eighth cent, plus the equalized rate from the point of origin to Boulder, Colorado.

Trial Examiner Norwood: That is from Denver to Boulder, is it?

The Witness: The freight equalized from point of origin to Boulder against Denver.

Trial Examiner Norwood: It would be from Denver to Boulder, regardless of point of shipment?

The Witness: I don't believe there were any limitations in that method as to what the shipping point should be.

By Mr. Wright:

Q. What do you mean by "equalized with Den-
2636 ver"? What process do you go through to equalize with Denver, in that situation?

A. My conception of that was this, that if the shipment originated at St. Louis, say, and the freight rate from St. Louis to Boulder was 15 cents, and the freight rate from St. Louis to Denver was ten cents, that the price would then be 12 cents, plus one-eighth cent, plus five cents per cwt. delivered at Boulder. Now as I say, I am not up on the details of that and I may be wrong, but that is my conception of it at this moment.

Trial Examiner Norwood: The five cents being the freight from Denver to Boulder?

The Witness: I don't know whether that is the freight from Denver to Boulder or not, it may not be, but it is the ratio of equalization of Denver against Boulder out of St. Louis.

By Mr. Wright:

Q. It required, in making a price by that method, did it not, a knowledge of the freight rate from the equalization point to the destination point, and from the shipping point to the destination point, for comparative purposes?

A. Not in making the price. The price was quoted to the buyer at 12 cents plus one-eighth cent, equalized Boulder against Denver. The buyer probably didn't know what that equalization was and probably the seller didn't; it had to be computed, I imagine, at the time it was invoiced.
2637 A knowledge of freight rates would be involved in that particular situation when the invoicing was done, but as I understand it, not when the quoting was done.

Q. Well, the customer wouldn't know what the price was until that computation had been made, would he; he wouldn't know what his cost was?

A. He knew his price, 12 cents and one-eighth cent, Boulder equalized Denver. But the ultimate cost to him he wouldn't know until he got his invoice and checked his freight rates.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2638 Trial Examiner Norwood: The hearing will come to order.

Mr. Hinds: If Your Honor please, my attention has been called to an inadvertent statement by Mr. Sprague when he referred to the period from 1933 to 1935 as being the OPA period, and I move to strike that portion of his previous answer as unresponsive, besides being an inadvertence. Do you consent to that?

Mr. Wright: Yes, I have no objection.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. You can take that up in the morning and call my attention to the particular part of the record that you desire to be stricken.

Proceed, Mr. Wright.

By Mr. Wright:

Q. Do you recall in that period that we have been talking about, in the very early 30's and the late 20's, Mr. Sprague, whether the other pigments in kegs, 100 pounds, 50 pounds, 25 pounds, and 12½ pounds, were also sold on those differential and equalization points?

A. Except in one or two instances where special contracts were taken on a public bid that called for some small barrel, I recall of no sales of dry white lead by Euston in anything less than barrel lots.

2639 Q. When did The Glidden Company first begin quoting prices on white lead-in-oil on the basis of zones or territories within which a flat price applied?

A. After The Glidden Company discovered that was the basis of competition on white lead-in-oil.

Q. When was that?

A. I can't recall the date. I would have to refer to my notes and even then I am not sure that I have it. If you want me to see what I can find, I have my notes here.

Q. Mr. Harold Rowe testified earlier in this proceeding —are you acquainted with Mr. Rowe?

A. Yes, I am.

Q. He is one of the gentlemen with whom you conferred in these meetings of the Pigments Division?

A. Yes, he was a member and I think the chairman of one of them.

Q. He testified here that it was his best recollection that the National Lead Company first began quoting and selling on the zone basis in the latter part of 1933 or the early part of 1934. Do you have any recollection as to that?

A. No, I have no specific recollection of that although those dates seem to be about what I would expect. When National Lead started that I would be unable to say.

Q. Then as soon as you learned that National Lead was quoting on that basis The Glidden Company began
2640 quoting on a similar basis, is that correct?

A. That is correct.

Q. Do you recall anything of the geographical extent of the territories and the differentials between them, which were involved in the first quotations under the zone method by National?

A. No, only in so far as Glidden's meeting of that competition might throw light on it. We had to learn what National had done, either from their—

Q. (Interposing.) Wait a minute. I asked you if you knew what the extent of those was. I am not asking you why. Please tell me simply what the extent of those zones was, and the differentials between them?

Mr. Hinds: Territorial—

Mr. Wright: (Interposing.) The territorial zones and the differentials between them on white lead-in-oil?

The Witness: Well, our knowledge of the use of zones occurred after Glidden had put white lead-in-oil in the hands of the paint divisions, with responsibility to develop distribution, and—

By Mr. Wright:

Q. (Interposing.) When did that occur?

A. I testified on that yesterday. I can refer to my notes but I can't remember the date. Do you want me to refer to my notes and give it to you?

2641 Q. I would like your independent recollection—it was refreshed yesterday—about that.

A. Well, it is in my testimony of yesterday; you have the record here.

Q. But you don't know what you testified yesterday with regard to that?

A. I can't repeat all of the dates in every respect that

I testified to yesterday, without again refreshing my memory. I can give you my impression, if you wish that.

Q. Well, give us your impression and we will see what it is based on.

A. I think it was around '33 or '34.

Q. Now what are you referring to, the transfer of the sales to the paint divisions?

A. When the Glidden paint divisions began actively to take that over.

Q. Are you familiar with the geographical territories comprising the so-called par or base zone on white lead-in-oil which were employed by The Glidden Company during OPA?

A. I would only be familiar with that to the extent that my memory could be refreshed by seeing some of our bulletins, but it does seem to me that that didn't occur during OPA. It seems to me that we learned of zone activities after that.

Q. I am speaking now of OPA, when your ceilings were held during the OPA period, 1942 to 1945.

2642 A. Oh—will you ask that again, please, sir?

Q. Can you describe generally the geographical territory comprising your par zone on white lead-in-oil during the OPA period?

A. I think I can describe it generally, but not with particularity.

Q. Roughly what states did it consist of, or how was it bounded?

A. Roughly it was bounded by the Ohio River on the South, the Mississippi River on the West, and the Great Lakes and St. Lawrence on the North, and there was a line somewhere across the Mississippi River, in Wisconsin, I think, or somewhere.

Q. And that ran all the way to the Atlantic Ocean?

A. Yes.

Q. I believe it is already in the record that there were territories in which you charged one-eighth cent per pound over the par price, and other territories, with one-quarter, three-eighths, one-half and three-quarters?

A. Yes, sir.

Q. You are familiar generally with those zones, are you not?

A. I am familiar with the fact that there were those areas that we encountered, but I can't describe them with any degree of particularity.

Q. That is satisfactory. Can you tell me now over
2643 how long a period of time The Glidden Company had employed those territories and those differentials prior to 1942—

Mr. Hinds: (Interposing.) I object to the use of the word "employed" because the witness' expression was "encountered". He didn't say that they employed them.

Trial Examiner Norwood: The objection is overruled.

The Witness: What period of time prior to 1942?

By Mr. Wright:

Q. Yes.

A. From 1942 back to the time that they were first encountered.

Q. Well, now, were the territories of those zones and the differentials between them as they appear in the OPA period substantially as they were when you first encountered them? In other words, have there been any significant changes since you first encountered the zone method of quoting, in that zone method?

A. I would not regard that significant changes had occurred, but there were changes in the trade areas, boundary trade areas, as I recall it.

Q. When did those changes occur?

A. I couldn't tell you.

Q. I call your attention to Commission's Exhibit 593 which is in evidence—Announcement of Premium Zones and Price Differentials Applicable to Sales of Euston
2644 White Lead-in-Oil, dated October 10, 1941, and to the areas listed there in the par territory, and the various differential zones. Is that substantially the same delineation of territories and differentials which was first employed by The Glidden Company?

A. I would regard that it is. On its face it indicates that it supersedes a previous schedule, indicating that there was a previous schedule and that it was different than this one.

Q. But you have no knowledge of that previous schedule, have you?

A. No specific recollection, no.

Q. No recollection of it?

A. No specific recollection of it, no.

Q. Do your records in The Glidden Company encompass any documents, historical documents, which would set

out chronologically the changes in territories or differentials which have occurred from time to time?

A. I don't think so. We tried very hard to locate that information at the time this matter came up, and my recollection is that most, if not all, of the type of document or paper that would show that, were destroyed in the ordinary course of the company's business, which now turns out to be regrettable.

Q. Then you know nothing of the origin of that pencil statement on the top of Commission's Exhibit 593, "Since 1935 adopted National"?

A. I am familiar with that, Mr. Wright. I know,
2645 though, nothing of my own knowledge of the origin of it. I have heard considerable about the origin of it.

Q. Of that particular notation?

A. Of that particular notation.

Q. Will you tell us what you know about the origin of that notation?

Mr. Hinds: What he has heard, do you mean?

The Witness: It is just what I have heard in this case.

By Mr. Wright:

Q. I want to know what you know of your own knowledge?

A. I know nothing of my own knowledge about it.

Q. Did you discuss this document with Mr. Dunn when you gave it to him?

A. I think I did.

Q. Do you recall what you stated to him regarding that document?

A. No, I can't tell you what I stated to him, but I can tell you what I undoubtedly did state to him.

Q. No, I want your recollection of what you stated to him.

A. Well, I do not recall the words I used in talking with Mr. Dunn back at that time, other than to say that he was inquiring for information about these matters from me, he had been referred to me, and I gave him, to the best of my ability, the information he wanted.

2646 Did you state to him at that time that similar territories and differentials had been adopted by National Lead in 1935 and had been put into effect by Glidden after that, and followed since that time?

A. I didn't say to him, to my best recollection, anything

about what National adopted in 1935, but I said to him, as I have said in this hearing repeatedly, that Glidden did follow the competition of the National Lead Company in regard to this pricing matter as promptly as they could.

Q. So that National may have adopted something like this in 1935, and if so you undoubtedly followed it, is that correct?

A. If National adopted—

Mr. Hinds (Interposing): Objected to. He hasn't made it clear whether he is asking what he said or what the fact was. I won't object on either ground if he makes the question clear. Does he want the fact or the conversation with Mr. Dunn?

Mr. Wright: I want the fact.

Mr. Hinds: There is no objection, then.

Mr. DuBose: I would like to object on the ground that the question is hypothetical and speculative and doesn't deal with facts.

Mr. Wright: We have dealt with many hypothetical matters heretofore in this gentleman's testimony.

Mr. DuBose: We are now making an objection on 2647 that ground.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. So that National may have adopted something like this in 1935, and if so you undoubtedly followed it, is that correct?")

Trial Examiner Norwood: Objection overruled. This is cross examination. Answer the question.

The Witness: If National adopted something like that in 1945, Glidden would have desired and undoubtedly did attempt to meet it as quickly as they could establish it.

By Mr. Wright:

Q. You said 1945—did you mean that?

A. I meant 1935.

Q. Mr. Sprague, you mentioned, as one of the factors in your business the competition with other pigments as far as basic carbonate white lead is concerned. You mentioned lithopone and zinc oxide and titanium pigments and leaded zinc oxide as the principal competition of white lead. Does The Glidden Company produce or market any of those pigments?

A. Yes, sir, it produces and markets titanium oxide and lithopone, in addition to white lead carbonate.

Q. Is Glidden a large producer of either of those pigments, percentagewise, in the respective industries?

A. Glidden's business in titanium oxide is a very
2648 small proportion of the total—I refer to the production and sale of titanium oxide. Glidden's business in lithopone is the exception that proves the rule. It is probably the largest in the United States, produced at multiple producing points.

Q. Who are the principal producers of titanium pigments?

A. The Titanium Pigment Company, the duPont Company, and The American Cyanamid Company—I believe they operate their titanium business under that name, but if not it is a subsidiary of that company, formerly the Interchemical Company's operation.

Q. Under what name does The Glidden Company produce titanium pigments, under its own name or under an operating division with another name?

A. As The Glidden Company.

Q. Does the National Lead Company produce titanium pigments?

A. I am unable to state as I do not know the corporate relationship between National Lead Company and the Titanium Pigment Company.

Q. Do you know that there is a corporate relationship between those two companies?

A. Yes, sir, I think there is.

Q. How large a factor in the titanium pigments business is the Titanium Pigment Company?

A. One of the principal factors.

Q. Is it a dominant factor in the industry?

2649 Mr. DuBose: I object to that, if Your Honor please. He is going far afield and this witness has not been qualified as an expert in the field of titanium pigments and the relationship of other companies to that industry.

Trial Examiner Norwood: Objection overruled.

Mr. DuBose: I object also to the form of the question.

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: I was very actively in touch with matters of that sort up to the middle of 1945. I was a member of the

Titanium Pigment Industry Advisory Committee of the War Production Board, and it was my impression—although the statistics of production of the titanium pigments were never publicized—that the Titanium Pigment Company was a large or the largest producer of the so-called "let-down" titanium pigment, and that the duPont Company was the largest producer of the pure titanium oxide, but the difference there was not, in my judgment from what I was able to learn, very great.

By Mr. Wright:

Q. Would it be fair to say that the duPont Company and the National Lead Company between them control most of the production of titanium pigments?

Mr. DuBose: I would like to object on the ground that it is incompetent, irrelevant and immaterial.

2650 Trial Examiner Norwood: Objection overruled.

A. Over what period do you wish to apply that question?

By Mr. Wright:

Q. I wish to apply the question as of 1941.

A. I think the major part of the production of titanium pigment at that time was conducted by those two organizations.

Q. Are titanium pigments principally produced under patented processes?

Mr. DuBose: May we have a blanket objection to this whole line of questioning?

Trial Examiner Norwood: You may.

Mr. DuBose: And an exception?

Trial Examiner Norwood: Yes.

A. There are so many patents in connection with the manufacture of titanium pigments that I should imagine the principal production has something to do somewhere with some patents. I got lost years ago trying to keep up with titanium oxide patents.

Q. What concerns control the principal patents in that business?

A. Well, I think The Glidden Company has the principal patents.

Q. At the present time?

A. At the present time, and it had patents in 1941.

Q. Were those patents in that industry in litigation?

2651 A. I don't think Glidden's patents were in litigation.

Q. Is that an industry in which prices and terms are fairly well controlled through patent licenses?

Mr. DuBose: I again would like to renew my objection upon the ground that this whole line of questioning is irrelevant and immaterial to this proceeding.

Mr. Wright: Your Honor, the point has been raised several times in this proceeding that one of the distressing factors in the white lead business has been the competition of titanium pigments, and this witness went into it on direct and I think I should have a nopportunity of cross examining him regarding it.

Trial Examiner Norwood: I think that he should be allowed to proceed. We have gone into the matter of competition, and this touches on that, on the nature of the competition.

Mr. Wright: I will frankly state that the purpose of my questions is to bring out that this is the right hand competing with the left hand.

Mr. Hinds: Is there anything wrong about that?

Mr. Wright: No sir, but I want it in the record.

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: May I have the question?

Trial Examiner Norwood: Read the question.

2652 (The reporter read the question as follows:

"Q. Is that an industry in which prices and terms are fairly well controlled through patent licenses?")

The Witness: I don't believe the prices and terms are in any way concerned with the patent licenses that I know anything about.

Mr. Ewing: I don't know whether Mr. Wright wants this concession from me or not but I am perfectly willing to concede, as far as National is concerned, that its left hand, white lead, is competing with its right hand, titanium—there isn't any doubt about it.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you know whether any of the other respondents in this matter, including the Eagle-Picher Company, Sherwin-

Williams, the Anaconda Copper Mining Company, International Smelting & Refining Company, and the National Lead Company, produce and market lithopone?

A. The Sherwin-Williams Company produces lithopone, but to my best knowledge does not market it at this time. Eagle-Picher Lead Company produces, and I believe markets, lithopone. I do not believe any of the others in this action are involved in lithopone, other than Glidden.

Q. Does your company produce any zinc oxide?

A. No zinc oxide.

2653 Q. Does the Eagle-Picher Lead Company to your knowledge produce zinc oxide?

A. You mean zinc oxide as distinguished from leaded zinc oxide?

Q. Yes.

A. I believe they do.

Q. How about the National Lead Company?

A. I do not believe National produces a zinc oxide.

Q. Sherwin-Williams?

A. Not to my knowledge.

Q. How about International or Anaconda?

A. You will have to state your time period because there has been a change in their situation.

Q. Prior to the time that the complaint was issued in this matter.

A. Prior to the time of the complaint—yes, the International Smelting & Refining Company produced zinc oxide during years prior to the issuance of the complaint.

Q. Do they now produce it?

A. It is my understanding that they are out of business and have disposed of their properties.

Q. On zinc oxide?

A. On lead pigments and zinc oxide.

Q. Does your company produce leaded zinc oxide?

A. No, sir.

2654 Q. Who are the largest producers of leaded zinc oxide?

A. In my opinion the Eagle-Picher Lead Company are the largest producers.

Q. Of what is leaded zinc oxide composed, generally?

A. Leaded zinc oxide is a composite pigment that chemically is a blend, or it may not be a blend, it may be a composite of zinc oxide and basic lead sulphate.

Q. Is that sold in varying proportions of zinc oxide and basic lead sulphate?

A. Yes, the pigment has been marketed in more than one form. For example, there is per cent leaded zinc oxide and 25 per cent leaded zinc oxide, and so forth, depending upon the ratio of the basic lead sulphate and the zinc oxide contained in the product.

Q. In a five per cent leaded zinc oxide to what would the five per cent refer, would that be lead content or the zinc oxide content?

A. It is a long time since anyone has asked me that, but it is my idea that the product would be roughly 95 per cent zinc oxide and 5 per cent basic lead sulphate—that is my impression.

Q. Does the National Lead Company produce that?

A. Not to my knowledge.

Q. Does Sherwin-Williams produce it?

A. Yes.

2655 Q. Do they market it, do you know?

A. They have at times. If you will be specific as to time I can be more specific as to answer.

Q. Say in the period from 1936 to 1940, did they market it?

A. Yes.

Q. I believe you stated a while back that you did not know at what time the differential for carload over less-than-carload shipments of basic carbonate was first quoted generally in the industry—is that correct?

A. That is correct.

Q. Do you recall any discussion of the question of the desirability or undesirability of such an l.c.l. differential during the pre-Code days by members of the industry?

A. I know of no discussions by members of the industry on anything during the pre-Code days.

Q. When I say "pre-Code" I mean prior to the time that the Code was actually approved. I mean to include in there—

A. (Interposing.) I am distinguishing the time in my answer as between the time that the Code discussions began. I know of no discussions prior to that in the industry.

Q. Do you recall any discussion during the Code time, then, concerning that?

A. No, not without refreshing my memory. I couldn't recall a specific discussion or a specific meeting, but I should expect that there was such a discussion along
2656 with all of the other considerations of those matters incident to the Codes.

Q. I show you, Mr. Sprague, a document for the purpose of refreshing your recollection, and ask you if you will read this and then state to me whether your recollection is refreshed about any quotation of less-than-carload differential on dry white lead?

A. No, that does not refresh my recollection.

Mr. Wright: I have no further questions this evening, Your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess now until ten o'clock tomorrow morning, Eastern Daylight Saving Time.

(Whereupon, at 4:10 p. m., EDST, May 14, 1947, the hearing was adjourned to Thursday morning, May 15, 1947, at 10:00 a. m., EDST.)

2657

Room 332, Federal Trade Commission Building, Washington, D. C., Thursday, May 15, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick, & Richardson, 815 15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

John A. Duncan, Esq., (1649 Union Commerce Building, Cleveland 14, Ohio, and

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

2658 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing is now reconvened in Docket 5253, in room 332, Federal Trade Commission Building, Washington, D. C., at 10 o'clock a. m., Eastern Daylight Saving Time, on the 15th day of May, 1947.

I want to bring up a ruling that I made the day before yesterday, which appears on page 2531 beginning on line 20 of that page. After seeing the question in the record it is entirely different from what I had in mind at the time as to its purport, and I think that counsel for the Commission should have been sustained in his objection, and I am reversing my ruling and sustaining his objection, and striking the answer.

Mr. DuBose: What page is that, if Your Honor please?

Trial Examiner Norwood: 2531.

Mr. Wright: That is the answer that appears on line 13 of page 2532?

Trial Examiner Norwood: Yes, line 13 of page 2532. The objection is sustained for the reason given by the Commission's counsel.

Mr. Hinds: I assume we can reframe our question when it comes to redirect, but I will not interrupt at this time.

2659 Trial Examiner Norwood: That is right.

Proceed.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Sprague, The Glidden Company is, I understand from your testimony, a very large producer of mixed paint; is that correct?

A. One of the largest producers, yes, sir.

Q. Is it among the first ten producers of mixed paint?

A. I think so.

Q. What is the attitude of the paint industry generally on the matter of selling on consignment?

A. My understanding of the attitude of the paint industry generally is that it is opposed to consignment selling.

Q. Do you recall the provisions of the Code of Fair Competition for the Paint, Varnish and Lacquer Industry generally?

A. No, I do not.

Q. Do you recall whether that had anything in it regarding the practice of selling on consignment of mixed paint?

A. No, I left the paint industry in 1925 in my active work, and I never even read the paint Code.

Q. When was it you stated that your company
2660 first began to employ consignment contracts in marketing white lead-in-oil?

A. My recollection is that it was about four or five years after that method of distributing white lead-in-oil had been adopted or started by our competitors.

Q. I believe you stated that you did not adopt your competitors' consignment contracts when you decided to embark on that practice, is that correct?

A. That is correct. I stated that our company prepared its own consignment agreement.

Q. By whom was that prepared, do you recall, by what department?

A. It was prepared by the Legal Department of our company.

Q. Do you recall what their instructions were?

A. No, it was handled entirely by our Paint Divisions.

Q. Do you know whether or not they had before them, when they drew those contracts, the contracts of your competitors?

A. I do not know whether they had competitors' contracts before them or not, but I surmise that they did.

Q. You were generally familiar with the paint business in the period 1933 and 1934, were you not, Mr. Sprague?

A. Well, I think I should answer that I was generally familiar with it in very rough outlines.

Q. You knew generally what the policies of The Glidden Company were in the marketing of paint?

A. No, I didn't follow that. The only paint item
2661 that I followed with any degree of interest was the white lead-in-oil.

Q. But you were in considerable contact with the Paint

Divisions of Glidden, weren't you, in connection with the transfer of marketing of that product to the Paint Divisions?

A. Not a great deal.

Q. Well, you first were employed by Glidden, as I recall, in 1915, did you say?

A. That is right.

Q. You had been with the company for 18 years by 1933, then, had you not?

A. That is right.

Q. Was the company then a large producer of paint?

A. In what year?

Q. 1933.

A. Yes.

Q. Relatively, in the industry?

A. Yes.

Q. Did you know of any plot or scheme by the paint industry to raise the price of white lead-in-oil in 1933 and 1934?

A. A plot or scheme by the paint industry to raise the price of white lead-in-oil?

Q. Yes, sir.

A. No, such a scheme would have been impossible.

Q. It has been testified here in this proceeding that it was the intention of the paint industry, through the
2662 provisions of the Paint, Varnish and Lacquer Code, to hamper the white lead-in-oil industry and to raise the prices of white lead-in-oil—

Mr. Hinds: (Interposing.) I object, particularly to the portion of the question which purports to state testimony, but I will withdraw my objection—

Mr. Wright: (Interposing.) I will withdraw the question.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. If it had been stated that there was a plot or plan on the part of the paint industry to raise the price of white lead-in-oil during the 1933 and 1934 period, would you say that was a correct statement of fact?

Mr. Hinds: I object to the form of the question. The fact exists independently of whether it had been stated or not. The hypothesis is entirely unnecessary in the question.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. If it had been stated that there was a plot or plan on the part of the paint industry to raise the price of white lead-in-oil during the 1933 and 1934 period, would you say that was a correct statement of fact?")

Trial Examiner Norwood: I think he may ask it that way. That is just a manner of speaking.

2663 Mr. Hinds: Well, it isn't a proper method of ascertaining evidentiary facts. Why not ask him what the fact was, if he knows? I am not sure that he knows.

Trial Examiner Norwood: You mean change it from a hypothetical to a categorical question?

Mr. Hinds: Yes.

Trial Examiner Norwood: I think the witness so understands it.

Mr. Hinds: My objection was to the form of the question, not to the relevancy of the subject matter.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I will have to ask you to read it again, please.

(The reporter again read the question.)

A. I have no knowledge of any such plot or plan. I do recall that during the period of the Code development, there was a great deal of discussion and difference between the paint industry and the lead industry as to where white lead-in-oil should go in the Codes. But the features and the details of that controversy I do not recall very much about.

By Mr. Wright:

Q. Do you recall that that controversy had as an aspect the raising of the price of white lead-in-oil?

A. No, I have no recollection of that aspect, if 2664 there was such an aspect.

Q. Now if there had been any such move by the paint industry generally at that time, Glidden Company would certainly have known about it, would they not?

A. It is impossible for me to give you a categorical answer to that, because The Glidden Company has at times been in and out of the Paint Association's industry activities.

Q. You made the statement, as I recall it, on your direct-examination, and particularly with reference to lead oxides, that the producer was in effect a converter, and that

the margin between the cost of pig lead and the price at which you could sell it was, in effect, a toll charge; is that correct?

A. That is correct.

Q. Now in the early days of your association with Metals Refining Company, you stated that you attempted to produce your own pig lead through secondary smelting, is that correct?

A. Yes, sir.

Q. Did that plan prove successful?

A. It proved unsuccessful economically.

Q. Well, then, following that you have relied upon outside purchases of pig lead, have you?

A. Entirely.

Q. Entirely?

A. Yes.

Q. You buy that on the regular market, I take it?

2665 A. Yes, sir.

Q. What pig lead price does Hammond take, is that the Chicago price of pig lead?

A. My recollection is that the cost of pig lead delivered at Hammond is 10 cents per hundredweight over the St. Louis lead market. If that is in error, I can correct it.

Q. Do you recall what the Chicago base is for pig lead?

A. My recollection is that that is the Chicago base.

Q. Now when you make litharge in your process of production, how many pounds of litharge do you produce out of 100 pounds of pig lead, do you know?

A. There are always process losses in handling lead, converting it, and there are weight gains due to the addition of the oxygen to the weight of the finished product. So the precise figures I couldn't give you, but you could calculate them—

Q. (Interposing) I believe Mr. Zoller and Mr. Merson testified—are you acquainted with either of those gentlemen?

A. Yes, I have met them.

Mr. Hinds: I think the witness hadn't finished his previous answer before the next question came.

Trial Examiner Norwood: Had you finished your answer?

The Witness: No, I hadn't. I said the amount produced could be very easily calculated from an analysis of the charts introduced earlier in the testimony.

2666 By Mr. Wright:

Q. Mr. Zoller and Mr. Merson testified, as I recall, that they produced about 107 pounds of litharge for 100 pounds of pig lead. Does that figure seem correct to you?

A. That is about right.

Q. Do you generally—I don't mean in all instances—but do you generally, or have you generally in the period, say, from 1936 to 1942, quoted carload litharge at $1.50 per hundred over the New York price of pig lead?

A. Yes, sir, and also on the basis of the St. Louis market.

Q. So that assuming now, that pig lead is 8½ cents a pound and your differential on litharge is a cent and a half, your price, then, is 10 cents per pound for litharge in carload quantities; is that correct?

A. That is right, delivered to destination.

Q. So that, assuming that you get approximately 107 pounds of litharge from 100 pounds of pig lead, your margin, then, between the price and the cost of your basic raw material, would be $1.50 plus 7 pounds at 10 cents, which would be picked up in the process of manufacture, or $2.20?

A. Well, the margin is the difference between the actual cost to produce the litharge and the selling price of the litharge. Now—

Q. (Interposing) I am talking about your gross margin between the price and the cost.

2667 A. That is correct, so am I. Now that gross margin consists of the factors involving the weight gain as an addition, the factors involving the process losses as a subtraction, and whatever they all are in the wash-out, the difference is the actual cost on the one hand and the selling price on the other.

Q. Assuming, now, that including your losses in production your overage was 7 pounds, at 10 cents a pound, you would add that to your $1.50 which would be your differential, and that would give you a figure of $2.20 a hundred pounds, would it not?

A. Well, I will have to do a little figuring here. I see what you are arriving at. I just want to check a little.

Will you say that again, Mr. Wright?

Trial Examiner Norwood: Let the reporter read the question.

(The reporter read the question as follows:

"Q. Assuming, now, that including your losses in production your overage was 7 pounds, at 10 cents a pound, you would add that to your $1.50 which would be your differential, and that would give you a figure of $2.20 a hundred pounds, would it not?")

A. I believe that is correct, provided you take into account that you secured 107 pounds; and the $2.20 then should be divided by 107 to produce a figure representing the differential at that point. In other words, it is
2668 not $2.20, but it is $2.20 divided by 107, if you assume that as the weight.

By Mr. Wright:

Q. But that $2.20 is the gross margin that you have to work with on that 107 pounds of litharge, that is your gross toll?

A. That is correct, minus the process losses, which you have not taken into account.

Q. I said to assume that it was 107 pounds; that you would already have deducted the losses, so we would have something to talk about.

A. All right. And that also assumes completely oxidized litharge to PbO.

Q. Will you explain that?

A. Yes. If we make sub-oxide, the black oxide or a brown oxide, or any other oxide that is not PbO, you do not get that 7 pounds weight gain that you are calculating. The weight gain becomes lower as the degree of oxidation of the lead falls.

Q. So that it is closer to a metallic lead content in the brown and black oxides than in the other litharges?

A. That is correct.

Q. Brown and black oxides are a part of the litharge category, though, is that correct?

A. Well, I regard them as such.

Q. You bill, now, to a customer, this litharge at 10 cents a pound, under this hypothetical calculation that we have made here?

2669 A. Yes.

Q. But the real thing is that $2.20, is it not?

A. Well, it is hard for me to tell what you mean by the "real thing". The present spread is that.

Q. In other words, it is out of that $2.20 that all your operating costs, every expense connected with the manufacture, and depreciation and profit, come?

A. That is correct. You should not use the term $2.20 in that light, however, Mr. Wright, because that is $2.20 divided by 107 only when your selling price of litharge is 10 cents and your lead market is 8½ cents. The minute you get other relationships, then the spread changes.

Q. The relationship of that overage will then change and it will vary that figure up and down?

A. That is right.

Q. When the price of lead is low, your overage will be less in dollars and cents than when it is high?

A. That is right. You cannot assume there is a spread of $2.20 divided by 107 in the litharge business. That is only true when pig lead is 8½ cents.

Q. That is true. We were assuming that for the purpose of getting this out.

Now when you ship that litharge to a customer, is it your general practice to bill that freight collect, or to ship it freight collect, I mean?

2670 A. Our practice was to the greatest possible extent to ship freight allowed, we to pay the freight. Now that is my recollection. There has been a great deal of study made on that particular point at various times in our company. The result, fundamentally, at the end is the same, but there are questions of traffic matters involved as to whether you allow the freight or whether you ship collect.

Q. When you ship collect, you allow the freight on the invoice, is that correct?

A. That is correct.

Q. And when you have used the term "allow freight", you mean that you would prepay freight, did you?

A. When you bill freight allowed, it is my recollection that we pay the freight and then allow it as a deduction on the invoice.

Q. That requires an increase in your working capital, doesn't it, to have that tied up in prepaid freight?

A. The amount of money that is necessary to pay the freight bills is a necessary part of your working capital.

Q. You are not prepared to state what the general practice has been of the company with regard to oxides?

A. No, that is a detail that slips my memory. I do remember considerable attention being given to it at various times, by us, and I remember there was attention given to that point in connection with some of the

2671 Code discussions, although I do not recall whether they were in litharge or whether it pertained to the shipment of antimonial lead. But the factor of the capital involved, and the traffic aspect of who makes freight claims and who audits the freight bills, are the determining factors.

Q. Would the records of your company, or would officials in your traffic department, have readily available information on what the general practice had been with regard to these various products?

A. I don't believe that could be obtained other than through the extent to which invoices could be found.

Q. Well, now, the extent that you prepay the freight on a particular transaction would reduce that margin that you have to work on in that business by that amount, would it not?

A. Yes, it would, but it would make no difference whether we prepaid it or whether we didn't—

Q. (Interposing.) In either event, it would shrink it by that amount?

A. Yes.

Q. Do you know what your average freight and shipping costs are in any period in the last ten years on oxides?

A. No, I do not know precisely what the average is, because such an average would be a meaningless thing. We use various methods of transportation in order to effect delivery, and any average would have to be an av-

2672 erage of trucking charges, an average of less-than-carload freight charges, and an average of carload freight charges, so that it would be relatively meaningless, as I see it, and I know of no such figures.

Q. In this hypothetical situation that we have given here, with the 8½ cent pig lead and selling litharge at $1.50 over, and picking up your 7 pounds in the process of manufacture, giving you the total of $2.20, that $2.20 less whatever transportation charges are involved, then, is the real price at which you sell your product, is it not?

Mr. Hinds: Objected to on the ground that the witness said the figure was $2.20 divided by 107, which, if you would like to have me give it to you, I have just divided out; 2.056 is my rough calculation.

Trial Examiner Norwood: I don't see that that is ground for objection.

Mr. Hinds: My objection is that the question presupposes a fact which is contrary to what the witness has said. He said it is $2.20 divided by 107.

Mr. Wright: I am willing to concede that it is that, and the record will be plain as to just what this situation is.

Trial Examiner Norwood: I think it is clear. Objection overruled.

A. The price at which we sold the litharge is 10 cents per pound, in that hypothetical case.

2673 By Mr. Wright:

Q. But what you receive, actually, over the inescapable cost of your basic raw material, is that $2.20 less the transportation charge?

A. You asked me the price at which we sold the litharge, and it was 10 cents, and we received 10 cents.

Q. But you figure your working inventory of pig lead, do you not, at the then market price of pig lead?

A. I believe we are required to figure our inventories—what kind of figures? I assume you refer to those that we use in our accounting. We have to figure our inventories at their actual cost, and at the close of our tax year they have to be adjusted to cost or market, whichever is lower, and we have a variety of figuring, inventory figuring factors to consider.

Q. Figuring them at market replacement cost—

A. (Interposing.) Market replacement at inventory date,—whichever is lower.

Q. Now in selling litharge in less-than-carload quantities, I direct your attention to Commission's Exhibit 810-i, which contains the so-called card prices of litharge and red lead and orange minerals of the Metals Refining Company. What relation does the price of 8½ cents there, on shipments of less-than-five-tons of litharge, bear to the New York price of pig lead?

2674 A. Our card price of litharge was that which we found necessary to meet the competition in the litharge market. We did not set it, we followed it. But we observed, and I believe that some of the cards will show, that there was a relationship there, on an average relationship, of a higher difference or a higher spread than applied to carloads, and that the spread followed closely the movements of the pig lead market.

Q. Do you recall what that spread was, generally?

A. There is a five-ton price in that card that you showed me—

Q. (Interposing.) There are two prices, 5 tons and less than 5 tons.

A. Yes, and my recollection is that that spread was 2½ cents, on an average.

Q. Over pig lead for less than 5 tons?

A. I am not certain of the detail on that.

Mr. Hinds: I would like to have it noted that this is not cross-examination, of course.

Mr. Wright: May I inquire the basis for counsel's—

Mr. Hinds: (Interposing.) There was no direct examination about quantity differentials, not from this witness.

Trial Examiner Norwood: He was asked about pricing, he went into that.

Mr. Hinds: The differences between prices of carloads or less than carloads or less than 500 pounds were
2675 not even hinted at by this witness. He discussed price on a different basis. I am not saying that it is not relevant in the case; I am just noting that it is not cross-examination.

Mr. Wright: I differ with counsel in that respect. I believe that this whole matter of these prices and the things to which I am about to allude were opened up on direct examination.

Mr. Hinds: I am sure counsel will not be able to point to anything in the direct examination which even remotely touches on quantity differentials.

Trial Examiner Norwood: Well, that is a part of this general subject. The objection is overruled.

Mr. Duncan: Please note an exception.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You stated that there was a differential on that less-than-5-ton price of approximately 2½ cents over the pig lead price?

A. I think that is correct, that is my recollection. Mr. Burruss is here, who has been very much closer to that than I, and I think perhaps he could give you more reliable testimony on that.

Q. Then the differential of 1½ cents in carload lots that was generally employed as compared to a differential of

2½ cents on less-than-carload lots, represented ap-
2676 proximately a 66⅔% larger margin over the price of pig lead to you, did it not?

A. You are still using this particular hypothetical position of pig lead?

Q. Using any position of pig lead, if the difference over pig lead on the card is 2½ cents and the difference in pig lead on the carload price is 1½ cents, that differential on the less-than-5-ton price is ⅔ higher than the differential on the carload price, is that not correct?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you recall the last question that we were on, Mr. Sprague?

A. Yes, sir. The answer is yes, it is a 66⅔% increase in the manufacturer's spread; and it is also a 10% increase in the selling price to the customer on that hypothetical case.

Q. In what the customer pays, at any rate?

A. That is correct.

Q. Red lead is likewise customarily sold in carload lots at a differential over the price of pig lead, is it not?

2677 A. Our sales, and I believe those of others, are made that way.

Q. What does the differential on red lead generally run as compared with that on litharge—95% red lead I am talking about?

A. Two and one-half cents as against one and one-half cents.

Q. And there is customarily the same relative difference on the so-called card prices of one cent higher for red lead than litharge?

A. Yes.

Q. The card prices, then, also bear a similar relationship as to red lead now, to the price of pig lead, as do the card prices of litharge; is that correct?

A. Yes, sir.

Q. How do you customarily move your card prices, in what fractions or amounts?

A. We watch for the announcement of changes in the card price of either the National Lead or the Eagle-Picher Company and immediately follow them.

Q. Well, what has been your observation as to the multiples or fractions in which those card prices of National and Eagle-Picher move?

A. We have found as a rule that they were adjusted with one-quarter cent movements of the pig lead market.

Q. I believe it has been testified here that the pig
2678 lead market customarily moves in fractions of a 20th of a cent a pound, or 5 cents a hundred; is that correct?

A. I have observed violent movements of the pig lead market in larger amounts.

Q. That is the smallest fraction that it moves in, is it not?

A. I don't recall any smaller movement than 5 cents a hundredweight.

Q. Now in your differential selling, you did not mean to indicate, did you, that when the price of pig lead moves up or down you need to see the carload price announcements of your competitors before you knew what the effect would be?

A. No, not with respect to the sales at a differential over lead. The only thing we needed to know was the lead market. I thought you were referring to the less-than-carload selling.

Q. No, sir, I am referring to carload now. So that you know when the price of lead moves up and down by any amount, that your carload prices on a differential are going to be up or down by the same relative amount?

A. We make every effort to learn that instantly, and at times have had a wire service to attempt to keep up with it.

Q. Now on your card prices of your oxides, do you wait until you see a card, when you know the price of pig lead has gone up to the next quarter of a cent on pig lead, do you always watch and see a card of National or Eagle-Picher before you change your card?

2679 A. The cards usually come to our attention somewhat later. The main source of information that I recall is the daily paper, the daily Metal Market, or the Journal of Commerce, which has that as of the day that it becomes known.

Q. It has been testified here by officials of the National Lead Company and the Eagle-Picher Company that generally speaking, the cards always move in fractions of a quarter of a cent with the pig lead market. Is that your understanding of the situation in the industry?

A. That was our observation, as I stated a few minutes ago.

Q. So that actually, then, you know, as a practical matter, that when the pig lead market moves up or down a quarter of a cent, there is going to be a card change with the pig lead market; is that correct?

A. I expect such a change.

Q. You would probably be very much surprised, would you not, if there were no such change?

A. That would be unusual.

Q. Would there be any precedent for it in the last 10 or 15 years that you can recall offhand?

Mr. Hinds: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Would there be any precedent for it in the last 10 or 15 years that you can recall offhand?")

2680 A. I recall that there have been times when those changes did not appear, but I cannot recall when or what the circumstances may have been.

By Mr. Wright:

Q. When you first went to the Metals Refining Company in 1930, you made, I presume, a thorough study of the marketing practices of that company and of competitors in the industry to determine how the product was sold at that time?

A. I knew how lead oxides were generally sold by the market leaders, because I had been selling them for a couple of years prior to going to Hammond. I didn't know anything much about what the Metals Refining Company had been doing in a broad way until I got there.

Q. But you knew what the general industry practices of the leaders were at that time?

A. That is correct.

Q. Do you recall in 1930 what the general practice was as far as quoting delivered prices? Were there any differentials added for delivery in certain areas or territories, or was there any equalization or differential point method employed?

A. I didn't know about that, because the sales that I had been making prior to 1930 were all carload sales. What I did was to purchase litharge and red lead in carloads and resell it for the Euston Lead Company.

Q. Now after you went with Metals Refining, did
2681 you become aware of the practices that obtained with regard to differentials for delivery, I mean differentials on account of the customer's location, now?

A. We had general sales information from the field to the extent of our contacts at that time, and we certainly knew something about the practices there.

Q. What were those practices?

A. I do not recall any more than that the differences that we have discussed, between carloads and less-than-carloads, were in general used in the trade. I don't recall that there were any sales made at that time for delivery at distant points, because the practice had been to attempt to develop a business on material deliverable close to Hammond.

Q. On which sales you made considerably larger margins than at distant points?

A. Well, that was the theory that I found was held there, that prices could be reduced under the prevailing market and a part of the reduction offset by a shorter freight haul to the customer.

Q. Now do you recall discussions during the Code period, of making differentials for delivery in certain areas of the South and the West on sales of oxides?

A. Yes, I recall there were such discussions relating to that. About all the detail that I can give you of those discussions is that the high costs of transportation into
2682 those distant areas was a tremendous factor in the cost of doing business, and the question of developing a means of meeting that problem in connection with the Codes was discussed.

Q. Now there are at present, are there not, differentials for delivery in card quantities of oxides in the West and the South?

A. Yes, I believe there are, and my recollection is both as regards carloads and less than carloads.

Q. Well, the ones for less carload are different, are they not, than those for carload? In other words, they are different territories and different differentials applying to them?

A. I do not recall for certain, but I don't think so.

Q. I direct your attention to Commission's Exhibit 762-A, and sub-numbers, which is in evidence as a bulletin of The Glidden Company to its branch offices, and I call your attention to the statement on Exhibit 762-B under "Red Lead and Litharge in Drums", and ask you to read that.

A. Yes, sir. It refers to Schedule AA.

Q. You will note that Schedule AA is the zone for those less-than-carload shipments.

Mr. Hinds: If Your Honor please, merely to save time if for no other reason, I object on the ground that this testimony is not within the issues in this case, because The Glidden Company's answer admits certain allegations of the complaint with respect to carload and less-than-
2683 carload zonings, and therefore, besides not being cross-examination, is not even in issue in the case, and we are just wasting time.

Mr. Wright: This witness has been on the stand before, he was on the stand on direct-examination in Cleveland, and we have discussed these zones, and I have found it necessary to go through considerable preliminary questioning to get to the points I want. I tried to get at this particular point by my preliminary questions, and I am now refreshing his recollection from official papers of The Glidden Company which are in the record, so that we can establish in his mind what these zones were so that I can then question him about them. I am trying to use the shortest method of getting the information that we want.

Mr. Hinds: I would like to ask whether counsel disputes my statement that these facts are not in issue. Do you claim they are in issue in this case?

Mr. Wright: I claim that the questions relating to this zone system and how it arose, and the circumstances attending its origin and the manifestations of it, as far as price discrimination is concerned, are at issue in this case. I think counsel will agree as to that.

Mr. Hinds: I am asking whether these particular facts are in issue. I understood that they are not in issue; that they are admitted in the answer.

Mr. Wright: Whether The Glidden Company
2684 used zones or not is not in issue, but the other facts attendant upon the use of those zones are in issue.

Mr. Hinds: If you will look in our answer, you will

see that we agreed to your statement of facts in that connection.

Trial Examiner Norwood: There are issues there respecting motives and effects, and so on, and I think it is very clear that counsel is within his rights, and I shall overrule the objection.

By Mr. Wright:

Q. Can you tell me over how long a period of time The Glidden Company has quoted those particular products in those quantities on the basis of those differentials and zones as appearing in Schedule AA?

A. They were quoted from the period beginning January 29, 1942, and on until the next bulletin, whatever it was, was issued, which superseded it. I notice this bulletin in itself supersedes a previous one that was dated in May of 1941. These bulletins were issued by the Paint Divisions from time to time as they had price change instructions to give to their salesmen.

Q. Mr. Sprague, what I am trying to get at by my question—maybe I can explain it a little more clearly to you—is for how long a period of time prior to January 1942 did The Glidden Company quote on the basis of
2685 those zones and those differentials on those products, not on the basis of that document.

A. That I cannot answer, because this Schedule AA defining the areas is a part of this bulletin, which superseded a previous one. They may have been changed at this time, as far as I know.

Q. Then you don't know what those zones may have been prior to 1942?

A. Not of my memory, no. These are the zones in effect at this time, that is certain. But how much before that—

Q. (Interposing.) Do you know that there were zones in effect prior to that?

A. I cannot be certain that there were zones in effect prior to that. I would have to see the prior bulletins. I cannot fix in my mind the date of the usage of zones.

Q. Does The Glidden Company have in its records a set of those bulletins going back over any considerable period of time, from which it could be determined when they first began to use that zone method?

A. I do not think so. As I stated yesterday, we made a very thorough search for everything we could locate of this sort, but our practice of disposing of things in general

in the company at two-year intervals makes it virtually impossible. We did think we could find some by checking some of the various offices, and so forth, but we were not, as far as I can recall, ever able to get a consistent sequential record of those things.

2686 Q. Then you don't know what changes might have been made in the period from 1930 to 1942 in the style or method of quoting on geographical differentials by The Glidden Company on oxides?

A. I can answer you in this way. Yes, we made changes in such style and methods as we had to to follow the competition that we had in the field. That applied to oxides as well as to the other lead products.

Mr. Wright: I move that that answer be stricken, Your Honor, as not responsive. I asked him if he knew.

Mr. Duncan: I ask that it stand, Your Honor. I think it is responsive. This is cross-examination.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the record as follows:

"Q. Then you don't know what changes might have been made in the period from 1930 to 1942 in the style or method of quoting on geographical differentials by The Glidden Company on oxides?

"A. I can answer you in this way. Yes, we made changes in such style and methods as we had to to follow the competition that we had in the field. That applied to oxides as well as to the other lead products.")

Mr. Hinds: If Your Honor please, inasmuch as it has appeared without dispute that the only style and method that this respondent ever had was to discover compe-

2687 tition and to meet it when and where it found it, to ask him—

Trial Examiner Norwood: (Interposing.) That doesn't come in—

Mr. Wright: (Interposing.) Your Honor, the question asked what changes his company had made, did he or didn't he know of them, and I want him to state on the record either that he does or doesn't know them.

Trial Examiner Norwood: The counsel will ask the direct question as to that, and he may bring that out, but he didn't ask it just that way.

Mr. Wright: It was a direct question—do you know what changes—

Trial Examiner Norwood: (Interposing.) You said, "Then you don't know". It makes a little difference there. I will deny the motion.

By Mr. Wright:

Q. What changes did the Glidden Company itself make in its method of quoting on oxides with regard to geographical areas in which differentials applied and the differentials applicable between them, in the period from 1930 to the date of that bulletin, January 1942?

Mr. Hinds: Objected to on the ground that it has not appeared that they made any changes in their method, their method having followed competition—

Trial Examiner Norwood: (Interposing.) Objec-
2688 tion overruled. Let the witness answer the question so as to give us those facts.

Mr. Hinds: I was making an objection that the question implies something that hasn't been shown.

Trial Examiner Norwood: If counsel is going to discuss the evidence and make statements here that might be construed as carrying a suggestion to the witness, I will ask the witness to withdraw while you discuss the matter. I don't think that it is good practice, and I will overrule the objection. Answer the question.

Mr. Wright: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Read the question.

(The reporter read the question as follows:

"Q. What changes did the Glidden Company itself make in its method of quoting on oxides with regard to geographical areas in which differentials applied and the differentials applicable between them, in the period from 1930 to the date of that bulletin, January 1942?")

Trial Examiner Norwood: Give us the information as to those changes, if any. Objection overruled.

The Witness: The question is: What changes in method were used? There were no changes in method used.

2689 By Mr. Wright:

Q. In other words, The Glidden Company made no changes in the territories to which differentials applied and the differentials themselves?

A. There were undoubtedly changes in territories and in differentials, but not in method.

Q. What were those changes in territories and differentials, do you recall any of them?

A. I do not recall any specific ones.

Q. Now it has been testified to here by Mr. Harold Rowe of the National Lead Company that the territories and differentials applicable to these oxides have been used by the National Lead Company in quoting since sometime around 1934. Do you recall the first employment of those territories and differentials by the National Lead Company?

A. As I testified yesterday, the only recollection that I have is that the employment of the zones, and so forth, occurred sometime after the Code period. I do not recall when that was.

Q. Wouldn't any large change in the territories and differentials applicable to them have been an important matter which would have engaged your attention at the time it occurred in the industry?

A. Yes, I think it would.

Q. Isn't that one of the matters, those differentials, which was discussed at some length by the members
2690 of the industry at the meetings of the pigment divisions when they were considering the Codes?

A. There were discussions at the meetings of the Pigment Committee, but there were more extensive discussions at the meetings of the Lead and Oil Committee, I recall that it happened in both cases; but you must remember that that is 14 years ago, and I can't get pinned down too close on the dates and the months.

Q. Now you have been testifying about those meetings on direct-examination.

Mr. Hinds: I object to that statement, and ask that it be stricken out as a comment, and a very unfair one, because this witness has been testifying, refreshing his recollection when necessary, on a subject matter quite remote from what he is now being examined on.

Mr. Wright: I am willing to withdraw the statement.

Trial Examiner Norwood: The objection is overruled. He is within the province of legitimate cross-examination.

Mr. Hinds: I didn't make that objection. I objected to the comment by counsel, which he has been gracious enough to withdraw.

Mr. Wright: I said I would withdraw it, because the rec-

ord will be perfectly plain as to what his testimony was on direct and on cross.

Trial Examiner Norwood: He has the right to refer
2691 to the witness' previous testimony, and comment on it and ask him to explain it.

By Mr. Wright:

Q. I recall your testifying on direct about what was discussed at a meeting of the Oxide Committee of the Lead Pigments Division on December 27th and 28th, 1933, on direct-examination, Mr. Sprague. Do you recall where that meeting was held?

A. I believe that meeting was held in Chicago.

Q. Do you recall a meeting of the Oxide Committee of the Lead Pigments Division on December 14th and 15th, 1933, at which Mr. Harold Rowe occupied the chair, and there were present Mr. MacGregor and Mr. Butzow, Mr. Erwin Willkie and Mr. William Willkie and yourself, Mr. Carroll, Mr. Coolidge, and Mr. Wormser?

A. I recall such a meeting, and that I attended such a meeting. I would need to refresh my memory as to the details of it.

Q. Would examining these minutes of that meeting, which appear as Respondents' Exhibit 137-A and B, refresh your recollection about that meeting? Do you recall that meeting?

A. Yes, sir.

Q. Do you recall the discussions that were carried on at that meeting?

A. In a general way only.

2692 Q. What was the discussion relating to the differential over pig lead being one of the most serious abuses in the trade, do you recall that?

A. Yes, I recall a few phases of that matter.

Q. What was the situation which was then considered to be an abuse?

A. Well, I recall one or two very specifically that I thought, and I think the others thought also, were a distinct abuse or difficulty, that arose out of the pressure, economic pressure, of that period of depression, and one of them was that there was a willingness on the part of the sellers of lead oxides who sold on a differential to accord the buyer some protection against market declines, and that was a very serious abuse to me, because I didn't have the background of sufficient pig lead inventories to have low

averages or averages other than the market, and when I had sold a carload of lead oxide on a 6-cent market, for example, and the market dropped to four or five cents, I couldn't afford to protect my customer and finally deliver the litharge at a 4 or 5-cent market. That was one—

Q. (Interposing) I recall—

Mr. Hinds: (Interposing) I object to interrupting.

Trial Examiner Norwood: Just a moment. Mr. Wright will conduct the cross-examination.

Mr. DuBose: Your Honor, I believe he was continu-
2693 ing his answer.

Mr. Hinds: He said there were several abuses, and he was in the middle of the first one when counsel interrupted him.

Mr. Wright: The abuse that he is talking about as an abuse is a matter that is entirely unrelated to the question that was asked him, and I would like to ask—

Trial Examiner Norwood: (Interposing) Do you move to strike the answer?

Mr. Wright: I move that it be stricken, and I intend to reframe the question and get an answer to it.

Trial Examiner Norwood: Read the question and the answer.

Mr. Wright: I will withdraw the motion to strike, but I want to stand on my right to interrupt the witness on what I conceive to be an irrelevant answer, and reframe the question.

Mr. Hinds: I would like to have it ascertained whether the answer was irresponsive. It seems to me that it was perfectly responsive, and it had only just begun.

Trial Examiner Norwood: Well, we will get along faster if we will let counsel conduct the cross-examination without interruptions, unless there is something very serious.

Mr. Hinds: If it hadn't been for counsel's interruption, the question would have now been fully answered.

2694 Mr. Wright: Your Honor, I renew my motion to strike that answer as not responsive.

Trial Examiner Norwood: Read the question and the answer.

(The reporter read the record as follows:

"Q. What was the discussion relating to the differential over pig lead being one of the most serious abuses in the trade, do you recall that?

"A. Yes, I recall a few phases of that matter.

"Q. What was the situation which was then considered to be an abuse?

"A. Well, I recall one or two very specifically that I thought, and I think the others thought also, were a distinct abuse or difficulty, that arose out of the pressure, economic pressure, of the period of depression, and one of them was that there was a willingness on the part of the sellers of lead oxides who sold on a differential to accord the buyer some protection against market declines, and that was a very serious abuse to me, because I didn't have the background of sufficient pig lead inventories to have low averages or averages other than the market, and when I had sold a carload of lead oxide on a 6-cent market, for example, and the market dropped to four or five cents, I couldn't afford to protect my customer and finally deliver the 2695 litharge at a 4 or 5-cent market. That was one—".)

Mr. Wright: Your Honor, the question related to *the* abuse, not *an* abuse, and it is the abuse mentioned specifically in the minutes, that of selling oxides at a differential over pig lead. The witness' answer related to the practice of protecting the buyer against a price decline on pig lead, which is an unrelated matter.

Trial Examiner Norwood: I think counsel is right.

Mr. Hinds: May I be heard on that? The witness was asked in connection with those minutes what abuses arose from this practice of quoting differentials over the pig lead market, and he said there was more than one abuse arising from that practice, and he was starting to relate the first one of the abuses, of which there are several, which arise from the practice of quoting differentials over the pig lead market. I understand there were several such abuses.

Trial Examiner Norwood: He asked for this one abuse, and he asked him for one thing, and the witness discussed another, and the answer is stricken.

Mr. Hinds: I respectfully ask for an exception, because these are several abuses arising from the one matter mentioned in the minutes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Will you state to us, Mr. Sprague, what was the 2696 specific abuse that is referred to in the first sentence of this paragraph of the minutes to which I have directed your attention?

Mr. Hinds: I object on the ground that the minutes them-

selves say that there were several serious abuses; that one of the most serious—

Mr. Wright: (Interposing) Counsel is coaching the witness by these objections.

Trial Examiner Norwood: I think counsel is out of order.

Mr. Hinds: I except to that ruling, also.

A. I must be reading the wrong place here.

(Mr. Wright indicates sentence to the witness.)

A. (Reading): "The practice of selling at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade."

Your question, now, if I understand it, relates to what is this one most serious abuse?

By Mr. Wright:

Q. The abuse that is mentioned in that particular sentence.

A. That refers, in a generic sense, to practices arising from the method of selling at a differential over pig lead that was injurious to the industry.

Q. Then it doesn't relate to the practice of selling oxides at a differential over pig lead itself; it relates to other matters?

2697 A. It relates to abuses that flowed out of that practice.

Q. Well, now, I call your attention to the fact that the sentence in the minutes states that "The practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade."

A. I have an advantage over you, Mr. Wright, because I was at the meeting and I know what was discussed, and the minutes are not of so much importance.

Q. In other words, the minutes, then, in that instance, don't accurately reflect what was discussed?

A. There is not an inaccuracy in the minutes, I think the minutes are fairly accurate. He was attempting to, in a short way, describe what happened at the meeting, and he referred to those abuses, and I know what the abuses were because I suffered from them.

Q. Well, now, had the practice of selling oxides at a differential over the price of pig lead been employed on a large scale and customarily in the industry prior to that period?

A. That practice was in effect as far back as I can remember.

Q. Only in the carload quantities, is that correct?

A. Well, I know of some contracts for the sale of lead oxides at a differential that were not specific as to
2698 whether the delivery should be in carload or less carload.

Q. Was the fact that it had been the practice of some producers prior to that time to accept at the carload differential price an order which was not delivered in a carload at one time, one of the things that was discussed in that connection?

A. Yes, very much so.

Q. You testified on direct that there were a great many battery manufacturers, numerically, did you not?

A. I said there were two groups of battery manufacturers; one was a large group, much larger than the other; and I didn't say how many of the battery manufacturers there were, but it was a fairly sizable industry.

Q. In connection with your duties, have you had any opportunity to study the battery business and the competitive conditions and practices that are extant in that industry?

A. Yes, I tried to be quite well informed on that matter during the period that I was in residence at Hammond.

Q. Is it a customary practice for the producers of oxides to furnish technical service to battery manufacturers in connection with the sale of their oxides?

A. Yes, it has been the custom for the oxide manufacturers to furnish that service during the period of my familiarity with the lead oxide business.

Q. The Glidden Company has furnished that service to its customers, is that correct?

2699 A. One of the things I tried to do was to strengthen our sales position by providing and supplying that service, and we did so for a period of time.

Q. What would be your estimate of the number of battery manufacturers presently in business in the United States at this time?

A. Well, I hate to pull a figure out of thin air, because I haven't a thing to put back of it. It was 1935 when I stopped my particular interest in watching that closely. But if you want just an estimate, it would be 150 or 175.

Q. You said there were two groups there. Will you explain those groups again?

A. Yes. That was a peculiar industry because there was a sharp line of demarcation between the small group of well-financed and large manufacturers, and the other group, which was all the rest.

Q. What is the minimum capital, do you think, that would be necessary to get into the manufacture of batteries?

A. To get into the manufacture of batteries? Well, based on what I saw among this large group of small manufacturers, it could be done in a basement with a drum of oxides and a keg of sulphuric acid and some plates purchased from somebody else, and I would say it was a very low investment required to get into the business, but I wouldn't want to say much about the kind of batteries that were made and what their worth was.

2700 Q. Is the battery business one which is characterized principally by small manufacturers in matter of numbers?

A. Yes. Like most other industries, there are very many more in number of the smaller battery manufacturers than there are of the larger ones.

Q. Who are the principal battery manufacturers?

A. My recollection is that that group would comprise the Electric Storage Battery Company; the U. S. L.—I believe that is now the Electric Auto-Lite Company, they have changed since I knew them; the Delco-Remy Company; National Battery Company; the Globe Union Company; the Solar Corporation.

Q. Does Solar produce the S. L. I. type?

A. There may be others, but that is as far as my memory serves me now.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 1:15.

(Whereupon, at 12:15 p. m., a recess was taken until 1:15 p. m., this day.)

2701 Afternoon Session.

1:15 p. m.

Trial Examiner Norwood: The hearing will come to order. Proceed, Mr. Wright.

PAUL E. SPRAGUE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. You were describing, I believe, the small and the large battery manufacturers at the time of recess.

A. Yes, sir.

Q. Are these products sold uniformly in drums or barrels of 600 pounds, whether to large or to small battery manufacturers?

A. Our sales to battery manufacturers have almost universally been in drums or barrels. But you asked me about the battery industry generally. I think some of the large battery manufacturers obtained deliveries in large returnable drums, and some without package at all, in bulk.

Q. Over how long a period of time has it been your practice to ship lead oxides in bulk?

A. That type of shipment is extremely limited and if it is practiced at the present time it is my recollection that it did not start until close to the time that I left Hammond.

Q. Hasn't there been a general feeling in the in-
2702 dustry against shipping these products in bulk or in paper bags?

A. Yes.

Q. For health reasons?

A. Yes, there has, because the oxides of lead are toxic or poisonous if taken into the digestive tract, and that fact mitigates against bulk shipments, and they are only justified where special arrangements exist between buyer and seller to load and unload the cars by suitable mechanical methods.

Q. Do you sell oxides in the usual 600 pound drums both to carload and less-than-carload purchasers?

A. Yes, sir.

Q. Now on the technical services that the company per-

forms for battery manufacturer customers, are those performed by the sales personnel?

A. No, we found that the type of technical service that was needed and was valuable could not be expected of the sales personnel. It required the services of specialized, trained men in that technique.

Q. Were they under the sales department or in the sales organization?

A. Well, I would say that in our case it was a question of them being available at the command of the sales department, but those people also actually worked in laboratory experiments and occupied a general position.

Q. By what means do you make their services
2703 available to battery manufacturers; is it at the request of the customer or do you have some program for that?

A. Both on the request of the customer and as a means of sales service in the nature of check-up calls, and in the nature of sales promotion.

Q. Do you customarily, through that service, check up on the experiences of your customers in using your oxides?

A. That is correct, and we also found it was necessary, particularly in respect to that service to small battery manufacturers, to maintain facilities whereby we received and tested for those manufacturers the batteries that represented typical samples of their production.

Q. And you did that for all customers who requested it or wanted that service?

A. And up to the limit of our capacity to do that. It requires quite a substantial lot of equipment, and particularly a lot of time, to run those tests—they are time tests.

Q. How does your sales organization on oxides cover the battery business? Is it a matter of regular calls at frequent intervals on all customers, or just how do you handle it?

A. Yes, our experience was that you had to call on the battery manufacturer and talk with him direct.

Q. And you customarily call on all your customers, then, at regular intervals, is that correct?

A. Well, I am not sure that I get the full import
2704 of your use of the word "regular". In selling merchandise you have to call as often as you find it necessary to maintain the right relationship and to maintain the business. Sometimes that is irregular and in many cases it is more frequent.

Q. Do you have regular sales personnel whose principal duties are in the battery business?

A. The sales personnel of the lead oxide division were in general distributed geographically, and some of the men had more battery trade in their travelling areas than others.

Q. They were salesmen not alone of these oxides, but of other products as well, is that true?

A. That is true. We attempted to handle the sale of all of our products through a salesman covering a territory area.

Q. He would cover paint—

A. (Interposing.) No, I am speaking entirely of the products of the Metals Refining Company Division. The Metals Refining Company salesmen at no time attempted to sell anything that was produced by any other division except during one period when we attempted to enlarge our distribution of white lead-in-oil through the use of the sales force of the Metals Refining organization.

Q. Approximately how many salesmen are actually employed at the present time by Metals Refining Company?

A. I can't answer as to the number employed today. I think Mr. Burruss can give you that.

2705 Q. What was it at the time you were there?

A. During the period I was familiar with it, the number of salesmen was approximately eight to ten.

Q. You spoke of the large battery manufacturers being in a position to produce their own oxides. What battery manufacturers are now producing their own oxides?

A. I am unable to state what the battery manufacturers are doing now, but at the time I was familiar with it I knew that oxides were being produced for consumption in the making of batteries by the Electric Storage Battery Company; the U. S. L. Battery Company; and at that time the Willard Storage Battery Company, which was then an independent concern—

Q. (Interposing.) Is that now connected with the Electric Storage Battery Company?

A. Excuse me, I believe I should correct my statement. During my experience Willard was always a part of the Electric Storage Battery Company, but I meant to say that the Willard plant in Cleveland produced some oxides as well as the plant in Philadelphia, of the parent company. Oxides were produced also during that period by other

battery manufacturers whose names I do not recall, in connection with a promotion scheme of a concern that had some equipment to sell that they alleged could be very easily used for making battery oxides. But I don't think that was a permanent phase of operation.

Q. What would you say would be the minimum
2706 total tonnage that a battery manufacturer could economically operate on, and produce his own oxides?

A. All I could do would be to estimate that because the question of fixed expense and overhead is quite an important one in determining at what point a manufacturer of standard articles can afford to start in as an additional effort to manufacture raw materials. But I will give you a guess, which would be a consumption annually of 4000 tons.

Q. Approximately what investment would be necessary to set up a production of 4000 tons of oxides per year, at the present time?

A. That would depend entirely upon the availability of housing.

Q. Speaking now as to the plant and equipment only, rather than as to the actual housing—I am talking about the machinery and plant.

A. I don't feel that I am qualified to answer that.

Q. Would you say that it would be quite a considerable investment?

A. No. The investment in that or any other manufacturing equipment today is so tremendously higher than it was during my experience here that it is probably safe to say that it would cost today nearly one and one-half or nearly two times what it would cost then.

Q. What would you say it would cost then?

2707 A. My guess would be, then, an investment, exclusive of housing, of $20,000.

Q. How many battery manufacturers, numerically, consume in excess of 4000 tons of oxides annually?

A. I couldn't answer that.

Q. Would it be very many?

A. Well, I would consider that it would be all of those whose names I gave you this morning, and quite some others in addition to that.

Q. But of that 150 or 175 battery manufacturers, the number would be quite small, would it not, who could profitably use 4000 tons of oxides a year?

A. It would be a small portion of the group but a large portion of the total tonnage consumed in storage batteries.

Q. As I understand your testimony, the lead pigments industry is constantly under the pressure of the possibility of production of oxides by the storage battery manufacturers?

A. That is correct.

Q. But that is not the case with the smaller battery manufacturers, is it?

A. Not where their consumption is less than the amount that would be attractive for them to produce the oxides themselves.

Q. Has it been your observation that the storage battery industry is one which is characterized in ordinary times by very sharp price competition?

2708 A. Yes, I think that is an industry that has been particularly characterized by sharp competition in all phases of competition, not only price but quality and service and guarantees and all those things that go into the merchandising program of storage batteries.

Q. During the period of the '30's, from, say, 1934 to 1940, was it an industry that generally operated on small margins, do you know?

A. During what period?

Q. From 1934 to 1940?

A. No, I have no way of characterizing or having knowledge of anything about that particular period as against others in that industry.

Q. Was there a fairly high rate of mortality among the smaller battery manufacturers during that period, or do you know?

A. That was immediately after the depression of '32. I would think there was a high rate of mortality in every industry during that period. I don't know that I could characterize the battery people as being worse.

Q. Has your company made any cost studies relating to sales in the battery business, showing relative cost of doing business with the various types of customers?

Mr. Hinds: Objected to as not proper cross examination, Your Honor.

2709 Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Has your company made any cost studies relating to sales in the battery business, showing relative cost of doing business with the various types of customers?")

Mr. Hinds: That, if it is material at all, is so as a part of respondents' case. It certainly is not cross examination.

Mr. Wright: Your Honor, I will direct your attention to a statement that this witness made on direct examination with regard to sales to various types of battery manufacturers, where he indicated that they suffered a loss on their sales—and I certainly can inquire into this matter.

Trial Examiner Norwood: Objection overruled.

Mr. Hinds: After being reminded of that, I will withdraw my objection; I had overlooked that.

Mr. Wright: I don't know what the purpose of the statement was—

Mr. Hinds: I have withdrawn my objection; I think you are right on that.

Trial Examiner Norwood: Answer the question.

The Witness: What do you mean by "cost studies"?

By Mr. Wright:

Q. Have you made an analysis of the various 2710 operating costs so that you can allocate them as to sales to the various classes of customers in the battery business?

A. I can recall that we made studies of this sort—to answer your question first, if you mean to keep accounting reports that do show that, the answer is no. But facing the problem in its broad aspects I recall one time that we made quite an analysis of the losses that we had sustained in our sales to the storage battery industry. This was some years ago, but I recall it because I used it as an argument on one of my visits to our headquarters office to see if I could persuade the company to adopt a more liberal credit attitude towards sales to the battery industry, and I had some data showing our costs in regard to credit losses. We also maintained for a period of years a plan whereby we tried to show our selling costs as among products by having our salesmen make daily reports allocating, on such reports, the time that they had spent in attempting to sell the battery manufacturer and some seven or eight categories of trade that those men sought to sell. I remember that was done.

Q. When was that done, do you know?

A. Sometime during the period 1930 to 1935.

Q. But you do not have any study, then, from which you could state with any authority, on the basis of statistics

or studies of your costs, that you suffer a loss in your sales to small battery manufacturers?

2711 A. I can state, with the authority of the observation and belief of a manager of the business who is watching the expenses and the costs which he sustains in doing business, but I couldn't show it from an accounting study in cents per pound.

Q. Do you have in mind, when you are saying that, credit losses?

A. I have in mind all of the factors that would be involved in showing a loss.

Q. Is credit loss one of those factors?

A. It is one of them.

Q. Is it the principal one that is in your mind?

Mr. Hinds: Do you mean the largest, or occupying the majority position. The word "principal" is ambiguous.

Mr. Wright: I asked him if it was a principal one.

Mr. Hinds: Pardon me, I thought you said the principal.

A. I would regard actual cash credit losses as one of the intermediate factors in size, of dollar value, among those factors that would contribute to a loss in soliciting that business, based on our experience only.

By Mr. Wright:

Q. Over what period of time is that experience that you are referring to? Is that in the 1930-1935 period now?

A. During the period that I was right there every day.

2712 Perhaps I could explain for you a little more than the matter of credit losses in the battery industry in our experience developed in this manner, that we would have these bankruptcies or these failures, and then of course there would be a receivership and there would be settlements, and the actual realization of the loss was usually a year or two further ahead than the time the difficulty occurred. But it was a notorious situation that not only the Metals Refining Company but the other producers, and more particularly the Eagle-Picher Company, were always present at a bankrupt battery manufacturer's meeting.

Q. Going back now to the zone differentials, particularly in the South and the West, on the oxides, do I understand that you don't know when those differentials in substantially the form that they now exist, were first employed

either by yourself or by any other competitor in the business?

A. I cannot recall that in respect to time, but I can recall it in respect to competitive conditions, as I have testified before.

Q. What do you mean by that?

A. I mean that that type of handling the pricing for sales at distant destinations was put into effect after it was encountered in the field.

Q. I show you Commission's Exhibit 808-H, which is in evidence, a portion of the Oil, Paint & Drug Reporter under date of June 11, 1934, and ask you to read the
2713 first couple of paragraphs there in fine print.

A. All right.

Q. Does that refresh your recollection any as to the time at which those differentials were first employed?

A. It does not refresh my recollection, but it indicates to me very strongly that this is evidently about the time that the source of information obtainable in New York from the Oil, Paint & Drug Reporter made such an announcement.

Q. Has it been your observation that that is a reliable source of information regarding market changes and marketing practices in the pigments industry?

Mr. Hinds: Now if Your Honor please—

Mr. Wright (Interposing): I would like to request, before this happens, that if counsel in making his objection is going to state an opinion about what the record reflects, that it be done without the presence of the witness.

Mr. Hinds: I would be perfectly willing to have the witness withdraw. I think it is somewhat of a slur on the veracity of the witness—

Mr. Wright (Interposing): I don't mean it in that sense at all.

Trial Examiner Norwood: He is evidently making this suggestion out of an abundance of caution.

Mr. Hinds: Certainly. I might say that all of my objections will be based on a sincere belief that they
2714 are supportable on their merits. If they have any collateral effect it will be due entirely, in my judgment, to the nature of the question which is asked, rather than to the character of my objection. However, I am very glad to have the witness withdrawn from the room.

Trial Examiner Norwood: Let counsel state the legal

grounds for his objection, and then it will be clear to me as to whether the witness ought to be excused.

Mr. Hinds: The legal ground is that while the reliability of a statistical source such as this magazine, or a daily record of market conditions, is material—

Mr. Wright (Interposing): Right at this point—

Mr. Hinds (Continuing): —the reliability of a hearsay statement—

Trial Examiner Norwood: Off the record.

(Discussion off the record).

Trial Examiner Norwood: On the record. Will you kindly step outside, Mr. Sprague.

(The witness was temporarily excused from the room.)

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Has it been your observation that that is a reliable source of information regarding market changes and marketing practices in the pigments industry?")

Trial Examiner Norwood: You mean that that 2715 exhibit was?

Mr. Wright: That magazine, the Oil, Paint & Drug Reporter.

Trial Examiner Norwood: Why can't he ask him whether that is his impression or not?

Mr. Hinds: That is not the basis of my objection. It has nothing to do with whether he has an impression or whether he can form an opinion, which I will concede that he can. The point of my objection is that whether or not the source of hearsay evidence is reliable, is immaterial. Now if this were a statistical fact, if it were average sales per month, or daily sales, and the question were, "Does that reliably report the lead market?"—then such a question would probably be material because then we would get away from the hearsay rule. But this thing that the attention of the witness has been called to, I think if I saw correctly, was not a statistical statement, it was a hearsay bit of commercial gossip. Now whether the gossiper is a reliable gossiper or an unreliable gossiper is entirely immaterial. I think probably this witness might know whether he is a reliable gossiper on an unreliable gossiper. But what has that got to do with it?

Trial Examiner Norwood: You introduced an exhibit based on that type of testimony.

Mr. Hinds: No sir. We have introduced that sort of

magazine, maybe that very magazine, for all I know,
2716 as to statistical matters.

Trial Examiner Norwood: He is cross examining this witness and he certainly has a right to test his information and test his attitude on this entire subject.

Mr. Wright: The witness' previous answer was that this would indicate to him that the source in New York from which the Oil, Paint & Drug Reporter got its information thought that the zones were put into effect at that time. Now it follows—

Mr. Hinds: (Interposing.) May I be shown the portion of the exhibit to which your question is directed? If it is statistical, I will withdraw my objection, but I don't think it is; I think it is gossip.

(Exhibit shown to Mr. Hinds.)

Trial Examiner Norwood: I don't think we need to discuss this any further. I am going to overrule the objection, ask the witness to come back and answer the question, and the cross-examination may proceed on any of these sources of information which we have referred to heretofore.

Mr. Hinds: Exception.

Trial Examiner Norwood: Counsel has his exception in each and every case to the entire line, as he may desire.

Mr. Hinds: In answer to my request that I be shown the portion of the exhibit to which the question refers, counsel points to some text, not statistics.

2717 (The witness resumed the stand.)

Trial Examiner Norwood: Proceed.

Mr. Wright: Will you read the question.

(The reporter again read the question.)

The Witness: Yes, I think that should be regarded as a fairly reliable source of information of that sort, particularly the type of information that is readily obtainable in New York.

By Mr. Wright:

Q. Mr. Sprague, you used some notes to refresh your recollection on direct examination. Do you have those notes with you?

A. Yes, sir.

Q. In whose handwriting are those notes?

A. My own.

Q. Will you tell me the circumstances under which they were prepared?

Mr. Hinds: I have no objection.

A. Yes, I prepared the notes just prior to coming down here, in the form of very brief references to the testimony that I expected to give, for the purpose of enabling me to refresh my memory in case I was asked about dates beyond the point where I could keep them active in my mind—and other pertinent features.

By Mr. Wright.

2718 Q. Did you confer with others in the Glidden organization in preparing those notes?

A. No. As a matter of fact I didn't have an opportunity to do that; I prepared them after I left the office, and on the train coming down.

Q. So you prepared those notes, then, in your own handwriting from your own recollection?

A. I prepared the notes in my own handwriting and I prepared them furthermore from a memorandum that I had prepared for myself, reviewing what I could recall in connection with the sequence of events relating to the Euston Lead Company and the Metals Refining Company.

Q. You prepared that memorandum yourself, did you?

A. I prepared it myself, yes, sir.

Q. Didn't you say yesterday that others conferred with you in the preparation of those notes?

A. No, I did not. I said that I had conferred with others over a period of time in refreshing my mind as to what had happened in this sequence of events, but I had no help in preparing the notes.

Q. Well, then, in consulting with others regarding the sequence of events, you obtained information then, did you, regarding those events, from them?

A. I received assistance in bringing back to my mind some of the various things that had happened over
2719 that period, particularly with respect to white lead-in-oil activities.

Mr. Wright: I have no further cross-examination.

Redirect Examination by Mr. Hinds.

Q. Mr. Sprague, I call your attention to your testimony on page 2618 of the record, and ask you if you desire to correct it. You were asked concerning a certain graph which was introduced in evidence, and you were asked this question:

"Mr. Hinds: Suppose you had left out of the months, here and there, exceptional months, would that have been appreciably different?"

The previous question was:

"Mr. Hinds: I notice here that for two or three years, from 1933 on to well into 1935 on your graph, line A, there seems to be an absolute straight line."

Then your answer to the subsequent question was:

"The Witness: That straight line was unchanged regardless of whether it was in or out, because those were frozen prices of the OPA."

Do you desire to correct that?

A. Yes, that is an inadvertent statement. I associated in my mind the straight line with the one that resulted from OPA price fixing, whereas I notice that the question related to a straight line period in earlier years, and therefore my answer relating that to the OPA is inaccurate.

2720 Q. Do you desire to correct the following testimony which appears at page 2650 of the record:

"Q. What concerns control the principal patents in that business? (You were referring to the titanium oxide business.)

"A. Well, I think The Glidden Company has the principal patents."

A. Yes, I would like to correct that. I am not convinced that I made that statement but apparently everyone else agrees that I did, and I wish to see that the record is corrected.

Q. What should be the answer?

A. I should have stated that The Glidden Company had some patents in the titanium oxide field. I did not wish to state that Glidden had the controlling patents in that field, and I still doubt that I said it.

Q. You spoke of servicing the battery oxide business. Would you say that servicing was more a requirement in your sales to the large battery manufacturers or to the smaller ones?

A. The servicing was very much more a requirement to the smaller battery manufacturers. It was almost a sine qua non in order to sell them and in order for them to operate.

Q. Why do you say that in contrast with your sales, such as they were, to the large battery manufacturers?

A. Well, I believe I explained that—no, I did not explain it—but the technique of making a storage bat-
2721 tery requires considerable experience and "know-how" in the compounding of the oxide paste that goes into the plates and in the forming and curing of those plates in preparation for putting the lead-acid cell in shape to function and ready to be sold. That required, furthermore, testing facilities and equipment to test the life and the performance characteristics of a storage battery after it had been built. We found that many, many of the small battery manufacturers did not have those facilities, and as a means, then, of getting their goodwill and their business it was offered to them by the seller of the battery oxides. That practice arose from the desire to make sales and also from the fact that—well, they all simmer back to the same end, the desire to make sales and the need for sales.

Q. What about the large ones? You haven't answered my question with respect to the large ones?

A. The large battery manufacturers did not require anything like that kind of attention because they had their own facilities and even much more adequate and complete facilities than we had.

Q. With respect to the expense of collections, credit collections and investigations, from your experience was there any difference between such expenses in connection with sales to small battery manufacturers as contrasted with the larger ones?

A. Oh, yes; there was no expense of that sort in
2722 connection with the large battery industry.

Q. What about the small ones?

Mr. Wright: Your Honor, I object to this line of testimony if it is by this means that counsel intends to prove any justification in the difference in prices to the different classes, because certainly this is incompetent evidence as to costs.

Mr. Hinds: It is sufficient to justify these questions at the present time, I think, if I say merely that I am having

redirect examination on matters which counsel brought out on supposed cross, over an objection which I later withdrew.

Trial Examiner Norwood: As to the use to which this evidence will be put, that is a matter of argument and discussion later on—but I think it should be received at this time.

Mr. Hinds: Will you read the question?

(The reporter read the question as follows:

"Q. What about the small ones?")

Trial Examiner Norwood: The objection is overruled.

The Witness: Those expenses with regard to the small manufacturers were high.

By Mr. Hinds:

Q. Now as to the expense, if any, of warehousing, was there any difference between the expense there on
2723 sales to the large manufacturers and sales to the small manufacturers of batteries?

A. Well, the matter of—

Q. (Interposing.) Yes or no? My question calls for a yes or no answer—was there any difference?

A. Very much difference when you sell the small manufacturer whom you serve through a warehouse stock.

Q. Why was that?

A. Because of the expense of moving the goods into stock and out of stock, and the storage and the delivery costs.

Q. Now was there any difference in your sales to large battery manufacturers contrasted to small ones, as to cash discounts?

A. Yes, we accorded a cash discount for payment within ten days on sales of less-than-carloads to that trade and to other trade.

Q. Do you remember what the amount of that discount was that you gave to l. c. l. buyers?

A. One per cent.

Q. You have referred to selling and travelling. How did the expense there compare as between sales to small battery manufacturers and sales to large battery manufacturers?

A. Well, the per ton cost of selling was very high.

Q. On which?

A. On the sales to the small consumers.

2724 Q. What about the actual transportation? First I will ask you by what means did you transport to the purchasers of lead oxides, the said product?

A. We used the means of public transportation that gave the quickest service available to the customer, freight or truck.

Q. Was there any difference per ton in shipping by rail, in carload lots, as contrasted with less-than-carload lots, of lead oxides?

A. Certainly, the less-than-carload rate, either by freight or truck, is higher than the carload rate.

Q. Was there any difference in the truck rate as between the larger shipments and the smaller shipments?

A. My recollection is that the trucking rates broke, that is to say, a higher and lower, at a certain tonnage.

Q. Do you happen to remember what that breaking point was?

A. No, I do not recall, but I think it varied with different truck lines, and so forth. I don't think we had uniform truck rates in effect during the period with which I was familiar with this.

Q. As to the expense of invoicing, bookkeeping, billing, correspondence, postage and other clerical items, can you say whether there would be any substantial difference per ton in selling a carload or in splitting that up into, say 20 different smaller shipments of lead oxides?

A. Well, the cost of invoicing per invoice is in
2725 general the same, and the more invoices you have per ton of goods sold, the higher the cost. In our case we had a cost system whereby we costed each sale and multiplied, of course, the paper work in connection with sales because of that.

Trial Examiner Norwood: He asked if there would be any substantial difference. I don't think you answered that.

The Witness: I thought I had. The difference is that the cost is greater for—

Trial Examiner Norwood: (Interposing.) Would there be any substantial difference between the two classes of business?

The Witness: I think there would.

By Mr. Hinds:

Q. Mr. Sprague, you gave, as what you called a guess, 4000 tons as the minimum you thought it would have been

practicable, when you were still in the business, for a battery manufacturer to profitably make his own lead oxides. In so stating did you have in mind the factor of price, or were you making an absolute statement?

Mr. Wright: Objection, Your Honor. The witness is on the record as to what he stated.

Trial Examiner Norwood: He can explain it or change it if he wants to. The objection is overruled.

By Mr. Hinds:

Q. The price of the oxides, I mean.

A. I am not sure that I understand your question, 2726 but I meant to say that it was my opinion that when a consumer reached the point where he required over a year 4000 tons of oxides, he then could well consider installing the equipment to produce that himself, for the purpose of having a better cost than were he to buy the material.

Q. Well, suppose he had reached that point, namely that he was consuming over 4000 tons of oxides a year, what would in your judgment be the deciding factor as to whether he would make his own or buy the oxides?

A. I think he would decide on the kind of a deal he could make with the lead oxide manufacturers, and how far he could beat them down.

Mr. Hinds: No further questions.

Trial Examiner Norwood: Do you have any further questions, Mr. Wright?

Mr. Wright: Yes, sir.

Recross Examination by Mr. Wright.

Q. Now on this matter of credit investigations, have you made any accounting surveys to show what your costs are as allocated to the various types of customers which you serve?

A. What do you mean by "surveys", Mr. Wright?

Q. I mean have you actually determined from your day by day costs, by an accounting study, what the cost of credit investigations is for battery manufacturers in 2727 the various different price classifications in which you quote?

A. No sir, not in the sense you mean. We had another method of giving us our ideas on that.

Q. Do you have such information as to the cost of warehousing?

A. I think not.

Mr. Wright: No further questions.

Redirect Examination by Mr. Hinds.

Q. Mr. Sprague, when you say you have not made any survey within the meaning Mr. Wright gave to that word, have you given any consideration and business judgment to the extent to which members of your local and your headquarters credit departments and your various salesmen and other executives have been obliged to spend their time on credit investigations in the lead oxide, small lead oxide field, as contrasted with other selling fields of your company?

Mr. Wright: Objection.

Trial Examiner Norwood: Objection sustained.

Mr. Hinds: Exception.

By Mr. Hinds:

Q. Have you made such study and consideration of that and the other factors where you say the costs have been greater in selling to the small battery manufacturer than to the large battery manufacturer, to enable you to say with considerable positiveness whether or not in
2728 the aggregate they considerably exceed any quantity differential that you have allowed?

Mr. Wright: Objection.

Trial Examiner Norwood: Objection sustained. You shouldn't lead the witness in that way.

Mr. Hinds: I respectfully state that I didn't intend to lead him, and I didn't regard the questions as leading. It was an unintentional offense if I did.

By Mr. Hinds:

Q. Now Mr. Sprague, you did state, and you have been reminded of it on cross-examination, that the sales to the smaller battery manufacturers, even with the differential, were substantially less profitable than those to the larger ones. Why did you say that, what was the basis of your statement?

Mr. Wright: Objection.

Trial Examiner Norwood: On what ground?

Mr. Wright: The witness didn't make any such statement.

Mr. Hinds: I would like to make an argument, if there is any question on that, and I have no objection to the witness leaving the room. I am very earnest in this question.

Trial Examiner Norwood: I am going to sustain the objection to that question. You may bring out his recollection of what he did say and then you may base some question on that if you desire.

2729 By Mr. Hinds:

Q. What, if any, study and consideration have you given to the question of contrasting the profit or lack of profit on your sales to the larger battery manufacturers, buying in carload lots, and those sales in less-than-carload lots or less than 500 pound lots, to the smaller battery manufacturers, for the purpose of ascertaining whether or not, despite the differential, the one is less profitable than the other?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. What, if any, study and consideration have you given to the question of contrasting the profit or lack of profit on your sales to the larger battery manufacturers, buying in carload lots, and those sales in less-than-carload lots or less than 500 pound lots, to the smaller battery manufacturers, for the purpose of ascertaining whether or not, despite the differential, the one is less profitable than the other?")

Mr. Wright: Objection. That is a long narrative statement to the witness, rather than a question.

Trial Examiner Norwood: The objection is overruled; answer the question.

A. We gave considerable attention to the cost of doing business as among customers of various sizes and customers of various kinds, and customers at various
2730 locations, out of which we realized; as I stated earlier in my testimony, that we had to do certain things in respect to the type of trade we sold in order to make a profit. Now we found that the cost of selling the small customers, and particularly the small battery manufacturer, was inordinately high, and I gave, or rather responded to a number of reasons for that, that we had ob-

served in our business by a common observation. It was there for all to see. But there was no accounting study prepared to reduce it to a specific figure.

By Mr. Hinds:

Q. In your judgment would it or would it not have been practicable to classify your accounts so as to allocate the time spent by various executives, salesmen and others to these different classes of customers?

A. It would not have been practicable nor would it have been prudent. We were obliged to operate with a minimum of fixed expense of that sort.

Mr. Hinds: That is all.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Mr. Sprague, you are excused.

(Witness excused.)

Trial Examiner Norwood: We will take a short recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come 2731 to order.

Mr. Duncan: Mr. Burruss, will you be sworn.

DAVID N. BURRUSS, JR., was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Duncan.

Q. Will you state your full name and address?

A. David N. Burruss, Jr., Hammond, Indiana.

Q. And by whom are you employed?

A. The Glidden Company.

Q. And what are your present duties?

A. General Manager of the Metals Refining Division.

Q. That is located where?

A. Hammond, Indiana.

Q. When were you first employed by The Glidden Company?

A. In 1926.

Q. And where was that?

A. At Collinsville, Illinois.

Q. Will you tell us what your duties were at that time, in 1926?

A. I was manager of the Chemical and Pigment Divisions Plant located at Collinsville, Illinois.

Q. Will you relate to us your subsequent places
2732 and assignments, with the approximate dates, and tell us your duties?

A. In 1933 I was in charge of the Nelio-Resin Division or Corporation and the Southern Pine Chemical Company, partially owned by The Glidden Company at that time, and they are now wholly owned divisions of The Glidden Company. I was also Assistant to the President of The Glidden Company. In 1935 I went to Hammond, Indiana, as General Manager of that Division.

Q. That is of the Metals Refining Division?

A. Of the Metals Refining Division.

Q. What have your functions included as general manager?

A. All the functions of management—sales, production, personnel.

Q. Do you remember when Glidden took over Metals Refining Company?

A. That was in 1929, I believe.

Q. And was it then a wholly-owned subsidiary of Glidden?

A. Yes.

Q. And how long did it continue as a wholly-owned subsidiary of Glidden before it became a division of Glidden, if you remember?

A. I think that was sometime in 1926, I don't recall the exact date.

Q. I don't think you understood my question. How long did Metals Refining Company continue as a corporation before it became a Division of Glidden?

2733 A. I think it continued as a corporation from 1929 until sometime in 1936, but I am not sure as to the exact time it was made a Division.

Q. At any rate it is now a Division of The Glidden Company?

A. Yes.

Q. Will you tell us what was produced by Metals Refining Company when Glidden took it over in 1929?

A. Antimonial lead, lead oxides and type metal.

Q. And did Glidden continue to produce all those products?

A. We continued to produce those products up until the war period, when we discontinued antimonial lead.

Q. What did Glidden produce at the Hammond plant in 1944?

A. Lead oxides and type metal, copper powder, iron powder, lead powder, cuprous oxide and cupric oxide.

Q. There is a distinction, is there, between cuprous oxide and cupric oxide?

A. They are both oxides of copper but they are different products.

Q. Now to what classes of customers does Glidden sell lead oxides?

A. To battery manufacturers, the oil refiners, fungicide manufacturers, dry color manufacturers and paint and varnish manufacturers.

Q. Do you include insecticide manufacturers in that?

A. Yes.

2734 Q. What percentage of lead oxides produced by Glidden is sold to the battery trade?

A. Over the period that I have been at Hammond, probably not over 30 per cent.

Q. Sold to battery manufacturers?

A. Sold to battery manufacturers.

Q. Let's take the battery manufacturers to whom Glidden has been selling lead oxides. Can you state approximately the percentage of your lead oxides that you have been selling in carload lots, and the percentage in less-than-carload lots?

A. Battery oxides would run approximately 60 per cent in carload lots and about 40 per cent in less-than-carload lots.

Q. And how would the 60 per cent carload figures be divided between the large and the small battery manufacturers?

A. Well, it would be a very small amount of that which ever went to a large battery manufacturer.

Q. Can you give us the percentage on that?

A. Probably not over ten per cent went to the large battery manufacturers.

Q. Will you tell us what difficulties, if any, have been encountered by Metals Refining Division in selling to the large battery manufacturers?

A. Well, having only one plant, there have been a number of factors that have affected our sales, or our ability

to sell the large battery manufacturers, such as our
2735 ability to properly service an account that is located some distance away from Hammond, to supply a battery manufacturer which has multiple plants. Our limited production of oxides was in some cases smaller than the total requirements of a large battery manufacturer. Then there is another difficulty in the fact that a large battery manufacturer is more or less standardized on the type of battery that he builds in his various plants, and he wants identically the same raw material in each one of those plants so as to have uniform specifications for their batteries. That made it difficult for us to sell even one plant, even though it were located in our own district, of a large battery manufacturer.

Q. In other words you had gained some experience then, from that, had you, that you didn't want to have all of your eggs in one basket?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Duncan:

Q. Were there any other factors that you can think of that you encountered in addition to the ones that you have already mentioned?

A. Well, to sell to some of these larger battery manufacturers it would take practically the entire output of our plant, which would mean that we would be having only one customer, and if we lost that customer we would be
2736 in a very bad position then for future business.

Q. Who have been your principal competitors in selling to the larger battery manufacturers?

A. National Lead and Eagle-Picher.

Q. Will you state the location and number of the lead oxide plants of each of your larger competitors?

A. National Lead has nine lead oxide plants distributed across the country—Brooklyn, Philadelphia, Atlanta, Charleston, West Virginia, Chicago, St. Louis, Dallas and two in California. Eagle-Picher has a plant in Joplin, Missouri, and one in Newark, New Jersey.

Q. Does Sherwin-Williams have but one plant?

A. Sherwin-Williams has a plant in Chicago.

Q. And Metals Refining only has the one plant and that is at Hammond?

A. It only has the plant at Hammond.

Q. Will you tell us approximately what the gross mar-

gin is between the cost of the pig lead and the price you ordinarily get for lead oxides?

A. In carloads, a cent and a half over pig lead on litharge, and 2½ cents over pig lead on red lead.

Q. And what is the principal factor in competing for the lead oxide business of the larger battery manufacturer?

A. It is largely a matter of being able to render service to the large manufacturer, rather than a question of price.

2737 Q. Relative to your principal competitors, have you been able to compete successfully on that basis?

A. No, we have not been able to render service to the larger battery manufacturers because of having only one plant and being, in most cases, quite some distance from the larger manufacturers.

2738 Q. About what per cent would you say you have been to sell to such buyers?

A. I think I estimated that around 10 per cent of our production, of our battery production.

Q. From your experience, Mr. Burruss, which part of your battery oxide business yields you the greater net profit?

A. Carload business.

Q. How do you explain that?

A. Carload business—Our expenses in connection with making those sales are much less than they are in making sales to the small battery manufacturer, the less-than-carload buyers. There are a number of factors that enter into that difference in freight and the clerical work in connection with handling of the orders through the plant.

Q. What has been your preference? Will you tell us whether you have had any preference with reference to selling?

A. We prefer to sell the carload buyers.

Q. You started to tell us the selling factors which you found made your sales to—was it less-than-carload buyers?—more expensive, or have you yet told us that?

A. I told you part of that.

Q. This is with reference to less-than-carload buyers of lead oxides. I want to know if you can tell us what selling factors you have found have entered into the picture as distinguished from selling lead oxides to carload buyers?

A. It affected our cost to those accounts—Did you
2739 mean the soliciting of that business?

Q. The cost.

A. In the selling to a small battery manufacturer or oxide user there were several additional costs: additional freight, additional cost of clerical work in handling the billing of the account, and so on, warehousing in connection with it, credit investigation being most if it, and credit losses in connection with that particular class of trade made up most of our expense in that connection.

Q. Is there an additional expense; namely, selling expense, that you include as a factor?

A. You refer to the solicitation of the account?

Q. That is right.

A. Yes, the more accounts you solicit in that case, the calls made by the salesman for the tonnage you obtain, your selling expenses are much higher.

Q. Will you explain, then, each of these items of additional cost more fully, if you can?

A. Well, your difference of shipping expense is the difference between the carload freight rate and the l. c. l. or truck rate. On the average that will run about 25 cents a hundred more. Then, in the case of making out invoices, it takes the same amount of paper work to bill one drum of oxides or bill a carload of oxides. It is a multiplicity of paper work in connection with the handling of the order.

2740 The l. c. l. buyer is sometimes serviced out of a warehouse, and then you have additional warehouse expenses in and out in that connection.

Then the credit investigation, in the case of the large buyer simply means we refer to Dun & Bradstreet rating, and that is about all. The small fellow, we have to get special reports on him and sometimes even our Credit Department makes personal contact with him before we pass credit.

Q. In that instance, is there any necessity to make investigation of the l. c. l. buyer and to continue the investigation even after you have once sold him?

Mr. Wright: Objection, Your Honor.

Trial Examiner Norwood: On what ground?

Mr. Wright: It is a very leading question, suggesting the information which counsel wishes brought out.

Trial Examiner Norwood: Read the question.

Mr. Duncan: I will withdraw that.

By Mr. Duncan:

Q. With reference to l. c. l. buyers of lead oxides, what has been your experience with reference to checking on their credit?

A. In the first place, before we can sell them as a class—Of course, there are some that are perfectly all right, but a lot of them we have to go a point where we have to make special investigation. As I said, for instance, we
2741 have to send a man from our Credit Department or have the salesman come back and get additional information.

Then, on a repeat order from that customer, there have been cases where we had to spend an awful lot of time in following up those accounts in order to keep them in such shape that we could continue to sell them.

Q. What has been your credit experience with reference to the carload buyers as a class?

A. As a class we have been able to handle those accounts with a very small amount of credit investigation. Generally, the Dun & Bradstreet rating is sufficient and occasionally a special report. It seldom has to be followed up.

Q. Generally speaking, what has been the differential of your price by carloads and your price by less than carloads?

A. A half cent on five-ton shipments, and a cent on less than five-ton shipments over the carload price.

Q. Have you made a detailed cost analysis of the exact differences between the selling cost factors in the case of carload buyers and those in the case of less-than-carload buyers?

A. No, we haven't made any detailed analysis of that. Our records are not kept that way at all. Our entire selling expenses is lumped against the entire oxides sales.

Q. Now, in preparation for your testimony here, have you made a study for the purpose of giving us a rea-
2742 sonable approximation of those differences?

A. Yes. We checked on sales that we have made to some of these l. c. l. accounts.

Q. What have you found?

A. We find our expenses in that connection are considerably higher than they are in connection with the carload buyer. We estimate it about offsets the difference in price that is charged.

Q. What has been your experience in the case of buyers of less than five tons of battery oxides?

A. We have only sold a very small amount of those as a class. They have been comparatively poor credit risks and entailed an awful lot of follow-up in order to collect on sales we have made, and our expenses in connection with those have been much greater than in connection with the larger buyers.

Q. Does that additional or second half-cent differential that you charge the l. c. l. buyer who buys less than five tons of lead oxides cover the additional credit losses and credit investigation expense in that class of buyer?

A. I haven't any detailed—

Mr. Wright: Your Honor, I object to questions along this line which go to the matter of costs and expenses, and unless there is some more proper basis for a legal establishing of what those costs and expenses were. So far
2743 we are only having opinion evidence by this witness.

Trial Examiner Norwood: We are having estimates from these men who conduct the business and who have to do business, or at least who do business on these estimates, and I think they may come in for whatever they are worth. Any objection to their not being accurate surveys would go to the weight. I shall overrule the objection.

By Mr. Duncan:

Q. Did you understand my question?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Duncan:

Q. Did you understand the question?

A. Would you repeat it, please?

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

The Witness: When you take into consideration the amount of time spent by our local Credit Department and our general Credit Department in Cleveland on that class of buyer, I would say that the added differential did not compensate for the expense in connection with handling that business.

By Mr. Duncan:

Q. Did you make any study of the expense of credit investigation?

A. I made no detailed study of the expense of
2744 credit investigation. That is, to be able to furnish you with any accurate figures as to the cost of handling any particular account.

Q. Can you tell us what your credit investigation and credit loss is in your sales from Metals Refining Division of lead oxides to carload buyers as a class?

A. As a class it has been relatively low as compared with the smaller buyers of oxides.

Q. What are the facts on the less-than-carload buyers? I am talking about the period before 1942.

A. Most of our losses on lead oxides were confined to the less-than-carload buyers, and most of our expense during that period was in connection with the smaller buyers. That is, prior to 1942. Since 1942 we have not been making very much lead oxide and have sold very few of those accounts.

Q. Before 1942, can you tell us about how many l. c. l. customers you had on your books, that is, approximately?

A. I can't give you an accurate figure, but I would estimate somewhere between 75 to 100.

Q. Have you been able to state exactly how much that expense has been in any typical period?

A. No.

Q. Would it be possible to give an exact figure?

A. No, our records are not kept—nor do we subdivide the expense of our Credit Department between our lead oxide business and all other lines.

2745 Q. What is your judgment on the matter generally?

A. Our losses in connection with the smaller accounts have been very much larger than with the larger buyers of oxides. Also our expenses in connection with servicing those accounts have been much larger. By "service", I mean collections and following them up on the part of our Credit Department.

Q. Will you state whether or not you have any warehousing expenses with respect to your sales of carload lots?

A. No, they were all shipped direct from Hammond.

Q. In other words, you didn't have to split up any carloads?

A. No.

Q. For local distribution, is that it?

A. Not to a carload buyer. It went direct from Hammond to the carload buyer's plant.

Q. Have you any way of showing your warehousing expense and what you call the moving-in-and-out-of-warehouse expense in relation to your less-than-carload sales in any typical period?

A. No, we have not kept any records on that in connection with our lead oxide sales, but we did make such a survey in connection with the handling of our lithopone business, and where we charge an extra quarter of a cent for ex-warehouse delivery. The result of that survey indicated the quarter-cent did not cover expense of in and out of warehouse, and we added drayage charges to the
2746 customer's plant. I assume that would be applicable also to lead oxides.

Mr. Wright: Your Honor, I move to strike all of that answer after "No, we have not". He is referring now to warehouse expense and dealing with customers on an entirely unrelated product.

Trial Examiner Norwood: It is clear that that final assumption should come out, I think.

Mr. Duncan: Your Honor, I have no objection to the assumption being stricken.

Mr. Wright: After he said he didn't know in answer to counsel's question should also come out.

Trial Examiner Norwood: Read the answer.

Mr. Duncan: That is just by way of comparison to lithopone.

(The answer was read by the reporter.)

Mr. Duncan: No objection to the last part. That should go out, but I think the balance—

Trial Examiner Norwood: (Interposing) The first part was not responsive to your question.

Mr. Wright: No, sir, and what the first part was related to directly was that assumption. If the assumption was invalid so also was the first.

Trial Examiner Norwood: He may lay the ground for this lithopone expense being approximately the same as the other. Then, after he lays that ground, he may
2747 bring out what he did there, but in the present situation I shall allow the motion to strike everything after the first denial, "No, we have not".

By Mr. Duncan:

Q. Mr. Burruss, did you have occasion to check on in-and-out expense with respect to lithopone warehouse stocks?

Mr. Wright: Objection, your Honor.

He hasn't established any similarity.

Mr. Duncan: I am about to do that. I can't do it any other way.

Trial Examiner Norwood: I think you should lay your ground first as to the similarity in the cost of handling lithopone and the commodity with which this proceeding is concerned.

Mr. Duncan: All right.

By Mr. Duncan:

Q. Mr. Burruss, is there any comparison between lithopone products and lead products with respect to the handling of the products?

A. They are both handled in carload lots and l. c. l. lots and warehouse lots.

Q. Is it your judgment that the products can be compared with one another with respect to their warehousing expenses?

A. Most of those expenses are on a tonnage basis and a fixed charge per ton for in and out.

2748 Q. Is your answer in the affirmative then?

A. Yes.

Q. Will you tell us whether you made any study of the lithopone warehouse expense?

Mr. Wright: Objection, your Honor. All the witness said was that the lithopone was sold in carload lots and less than carloads and in warehouse quantities. That applies to almost any commodity in the whole United States. There is no indication here of the class of trade or the users or the similarity of the methods of handling it. All that answer went to was the quantities in which it was delivered. Obviously everything that is traded in is handled in those quantities from corn syrup to Wheaties.

Trial Examiner Norwood: My understanding is that he has indicated by his testimony that the cost of handling these two commodities are similar or practically the same. You may question him further about that if it isn't clear.

Mr. Wright: There has been no indication that they sold the same class of customers or that the hauls or circumstances under which they are sold and delivered are the same.

Trial Examiner Norwood: I don't think that is necessary here in showing these costs of handling.

Mr. Wright: Obviously the locations of customers and

the factors that are involved in the delivery are of the
2749 essence in determining the comparable basis of the two commodities. As I understand it, lithopone is sold to the paint industry. We are talking now about a product sold to the battery industry.

Trial Examiner Norwood: This question is directed to the cost of in and out of the warehouses.

Mr. Duncan: That is right, your Honor. I think the witness has shown the comparison of the products so that he can, at least, merely for the purpose of weight, attempt to tell your Honor that he has a study of the lithopone warehouse expenses and then it is up to your Honor to determine whether or not the assumption should be made that the results that he has reached with reference to his study of the warehouse expense in connection with lithopone should be applied to lead oxides.

Mr. Wright: Your Honor, on the same basis the warehousing expenses of the paint divisions of Glidden would be evidence of what their warehousing costs were for metallic leads or any other commodity, but still it has no relevancy to the warehousing costs of these different oxides.

Trial Examiner Norwood: If it were paint or anything else he wants to use as a basis of comparison, if he will show they are practically the same—counsel has some doubt as to whether grounds have been laid?

Mr. Wright: That was the sole purpose of my objection on that, that there hadn't been such grounds.

2750 Trial Examiner Norwood: I don't want to take the time to read the record back here. I will sustain the objection to the present question and ask counsel to make sure that the witness has answered as to these comparative costs between the two commodities.

2751 By Mr. Duncan:

Q. Mr. Burruss, in respect to warehousing expenses, do you regard the lithopone product in the same category as lead oxides?

Mr. Wright: Objection, Your Honor. That question is so broad and general that it is not specific, it doesn't relate—

Mr. Duncan (interposing): Specific reference was made.

Trial Examiner Norwood: Do you mean with regard to the cost of handling it in the warehouse, in and out?

Mr. Duncan: Yes.

Trial Examiner Norwood: You may answer that. I will overrule the objection.

The Witness: Both of those items are pigments, and they take approximately the same warehouse expense. I haven't checked that exactly one way or the other, but they are approximately the same.

By Mr. Duncan:

Q. Now, have you made any study of the expense, warehouse expense, with respect to lithopone?

A. Yes.

Q. Will you tell us what you found?

Mr. Wright: I object, Your Honor. The witness just stated he hasn't checked whether they are the same
2752 one way or the other. He has a belief.

Trial Examiner Norwood. Objection overruled.

By Mr. Duncan:

Q. Will you answer the question?

A. Will you repeat it, please?

Trial Examiner Norwood: Read the question.

(Question read by reporter.)

The Witness: The survey we made on lithopone indicated that our warehouse expense exceeded ¼ cent per pound.

By Mr. Duncan:

Q. Mr. Burruss, in your judgment what effect do price differences have in competition in selling lead oxides?

A. Service rather than the small difference in price controls the sales to the larger battery manufacturer. In case of the smaller manufacturer, price is apt to be competitive, but the main factor in making a sale to that class of account is a liberal credit policy.

Q. Did you find that Metals Refining Division was in the same position as its competitors to give service to the large battery manufacturers?

A. No. With one plant we were not in as good a position to service a large battery manufacturer having multiple plants.

Q. To what extent is price a factor, in your judgment, in selling to the small battery manufacturer?

A. It must be competitive on price to the smaller
2753 battery manufacturer.

Q. Have you been talking about the period since World War II started?

A. No, we haven't made much oxide since World War II.

Q. Will you explain the circumstances which have led Glidden to keep on selling lead oxides to a class of purchasers with greater credit losses and expenses?

A. We had to maintain a volume of production in our plant that would enable us to realize a profit on that operation, and where that was not obtainable from a source of good credit, we had to take on the less profitable business.

Q. In that regard how does your position compare with your competing producers of lead oxides?

A. We are in somewhat of a different position from our competitors because of having only one plant and not being able to enjoy or even to supply the larger battery manufacturers. We have had to confine ourselves more to the smaller users, and in that way we are in a different position, than our competitors. The only other manufacturer that compares with us in size is Sherwin-Williams, and they consume most of their own oxides.

Q. Have you charged any higher delivered price to buyers at a distance from your single plant?

A. We charge a competitive price on oxides wherever we have sold them.

2754 Trial Examiner Norwood: Does that answer the question?

The Witness: We have charged differentials in those territories distant from our plant where it was possible to charge them.

By Mr. Duncan:

Q. Have you made any detailed differential analysis of the added cost of charging to delivery points, say, in the West?

A. No, I haven't made any detailed analysis of it.

Q. Why is that?

A. Our records are not kept so that we can obtain that information.

Q. But from your experience can you make a fairly reliable approximation?

A. The difference between the less carload and the carload freight rate to the distant points is generally sufficient to absorb the differential that is charged on shipments made from Hammond.

Q. Would you say that the distant buyers have been favored or not favored?

Mr. Wright: Objection, Your Honor.
Trial Examiner Norwood: Sustained.
Mr. Duncan: I will put it this way:
Q. As a result of that, what is the effect, then, on the distant buyer?
2755 A. The effect on the distant buyer and the effect on ourselves is that we have taken a less margin of profit on a sale to that buyer than we have on one close by. He has been able to get his oxides at competitive prices.
Q. Why have you been willing to do that?
A. Mainly to maintain volume of production in order to have an over-all profitable operation.
Q. To what extent have you sold your lead oxides in territories where the territorial differential has been added?
A. We sold a very small amount in those territories.
Q. Will you explain that, please?
A. Business is more expensive for us to handle because of the higher freight rates, and it hasn't been attractive, and we have only taken it when it is necessary to maintain volume.
Q. In the more remote regions, do you feel competition from other plants that are nearer?
A. Having only one plant in Hammond and going to the southwest or to the west or to the south, we have the competition of plants of our competitors who are located close by.
Q. How does that affect you?
A. That competition prevents us from realizing as much gross profit on those sales as we would if we were able to charge the higher differential without the competition.
Q. Why do you sell at all in those remote regions?
A. As I said, simply to maintain volume.
2756 Q. Have you ever had or used a zone map?
A. No.
Q. On those cases where you have before the war—that is, World War II—made sales in remote regions, how did you name your price?
A. We met the competitive price in the district, in the part of the country in which the sale was made.
Mr. Wright: Objection, Your Honor, it is not responsive.
Mr. Duncan: I think it is.
Trial Examiner Norwood: I think it is.
Mr. Duncan: Absolutely.
Trial Examiner Norwood: Overruled.

By Mr. Duncan:

Q. On those occasions when Metals Refining had decreased its price on lead oxides, what have been the circumstances leading to such a decrease?

A. Following the drop in the lead market and decrease in price of oxides on the part of our competitors, our price was lowered accordingly.

Q. What was the economic effect then upon your business?

A. Until the inventory that we had on hand was disposed of, we realized a smaller margin of profit on the tonnage produced from that inventory until it could be replaced at a lower market.

2757 Q. What have been the circumstances which have led you to increase your price of lead oxides when you have done that?

A. When there was an advance in the lead market and competition advanced their prices, we advanced ours also.

Q. Have you ever made lead oxides on any other basis other than the sale of the finished product?

A. Yes, we have made them on a toll basis.

Q. Will you describe that?

A. On that basis of sale the purchaser supplied us with lead and we converted it into lead oxides for him at a toll charge, which is the same differential as we would charge if we had bought the lead ourselves.

Q. In substance what is the economic effect of that practice in your business as distinguished from the economic effect of buying the lead and then selling the finished product to the customers at an agreed price?

Mr. Wright: Objection, Your Honor. This witness hasn't been qualified as an economist.

Mr. Duncan: He is running the business.

Trial Examiner Norwood: Read the Question.

(Question read by reporter.)

Trial Examiner Norwood: I think you could ask him questions that would bring that out in a factual way. I think you are asking him for an expert economist's opinion. You may ask him how that is reflected in his profits and

2758 losses and things like that, but I wouldn't couch it in the scientific language. Objection sustained.

By Mr. Duncan:

Q. Mr. Burruss, will you tell us how that was reflected in your profit and loss?

A. There is no difference between the sale of that kind and the sale made where we purchased the lead and sold it at a fixed price. We are simply converters in the first place, and all we have is the differential to work on.

Q. Now, Mr. Burruss, have you ever received any request or any suggestion or intimation from any of your competitors as to what role Metals Refining Division of the Glidden Company should follow with respect to Glidden's pricing and pricing methods?

A. No, sir.

Q. Did your company at any time to your knowledge ever enter into any agreement or understanding or arrangement with any other producer or seller of any lead pigments with respect to the fixing of prices?

A. No, sir.

Q. Has any such agreement or understanding or arrangement come to your knowledge?

A. It has not.

Q. Have you ever heard of any?

A. No, I never heard of any.

2759 Q. Did anybody in the company have any authority to enter into any such agreement, understanding or arrangement?

Mr. Wright: Objection, Your Honor. There is no showing that this witness has knowledge of the authority the people in the Glidden organization might have.

Trial Examiner Norwood: Read the question.

Mr. Duncan: If Your Honor please, this witness is in charge of the Metals Refining Division of the company. He was Assistant to the President for some years. He isn't just an employee.

Mr. Wright: He is not an officer of the corporation, however.

Mr. Duncan: He is manager of the Metals Refining Division.

Trial Examiner Norwood: Lay the ground for that or else ask him if he has knowledge of that.

Mr. Wright: I will withdraw the objection.

Trial Examiner Norwood: All right.

Mr. Duncan: Will you repeat the question?

(Question read by reporter.)

Trial Examiner Norwood: Answer from your own knowledge.

The Witness: Not to my knowledge.

By Mr. Duncan:

Q. Did the company either through you or any-
2760 body else at any time enter into any such agreement, understanding or arrangement?

Mr. Wright: Objection, Your Honor. This is cumulative and leading.

Trial Examiner Norwood: Objection sustained.

Mr. Duncan: Note an exception.

Trial Examiner Norwood: Your qualification there—did the company do this through anybody else—renders the question objectionable. Ask him if he knows about it.

Mr. Duncan: All right.

By Mr. Duncan:

Q. Did the company through you at any time enter into any such agreement, understanding, or arrangement?

A. No, sir.

Q. You understand that when I refer to "agreement, understanding or arrangement" in these questions which I have just asked you, I have been referring to oral as well as written agreements, understandings or arrangements?

A. Yes, I understand that.

Mr. Duncan: That is all. You may have the witness.

Trial Examiner Norwood: Cross examine.

Cross-Examination by Mr. Wright.

Q. What is your definition of an agreement or understanding, Mr. Burruss?

A. A meeting of the minds of two parties.

2761 Q. In other words, if A and B met—I will withdraw that. How long have you been with Metals Refining Division, did you say, Mr. Burruss?

A. Since the Fall of 1935.

Q. You had nothing to do with the negotiations then under the Pigments Division of the Lead Industries Association?

A. No.

Q. You have been speaking of your prices being competitive and of competitive prices in your direct testimony. What do you mean by the word "competitive" in that sense?

A. By that I mean that we have sold our products at the highest price we could get for the products, meeting the competition we encountered in the price.

Q. The same as the price of the market leader in that area?

A. Wherever it was possible or wherever it was possible to ascertain that price.

Q. You stated that 30 per cent of the oxides went to the battery business. Where, roughly, are your sales percentagewise of the remaining 70 per cent?

A. Largely to the dry colors, insecticides, fungicides, oil refiners, paint and varnish trade.

Q. Did you sell in carloads to the paint and varnish trade generally?

A. Yes.

Q. To what customers do you generally sell in
2762 carloads in the paint and varnish trade?

A. I can't give you the names of those accounts. They are on the tip of my tongue, but I can't think of them.

Q. What per cent of your business in oxides goes to the paint and varnish trade, roughly?

A. Including our own plants?

Q. No, sir. Sales to others.

A. That is the paint and varnish trade?

Q. I meant to exclude Glidden's own consumption.

A. That would be, roughly—I have no basis of making this estimate—I have made no analysis, but I would guess between 10 and 15 per cent.

Q. Of that somewhere between 10 and 15 per cent sold to the paint and varnish trade, how must of it was sold in carloads at the carload price?

A. To companies that I haven't been able to remember the names of are carload buyers and make up the biggest portion of that tonnage.

Q. When you were giving these figures, 30 per cent to battery manufacturers, you were combining the various litharges and red leads together, were you not?

A. Yes.

Q. Is there much litharge sold to the paint and varnish trade?

A. The varnish manufacturer, yes.

Q. About how much of that 10 or 15 per cent of
2763 the oxide business to paint and varnish manufacturers is litharge?

A. That is small compared to the total of red lead business. There again it is probably 20 per cent or less.

2764 Q. Red lead makes up by far the biggest bulk of that?

A. Yes.

Q. How about the dry color industry? How is that divided between litharge and red lead?

A. Dry colors, I don't believe take any appreciable amount of red lead, if any at all, because those sales are litharge.

Q. In that industry are those products further processed?

A. Into chrome yellow and chrome greens.

Q. Made directly from the litharge?

A. Made directly from the litharge.

Q. How are those customarily purchased in the dry color business, carloads, five-ton—

A. Practically all in carload lots.

Q. How about the insecticide and fungicide portion of your business? How much does that account for outside of Glidden's own consumption?

A. That is approximately the same as the dry color business. It is all carload business.

Q. About how much of the total is it, roughly—five, ten percent?

A. That will run somewhere between 10 and 15 percent of the total oxide business.

Q. Do you sell any to the petroleum refining industry?

A. Yes.

Q. About how much of your production goes there?

2765 A. I would be guessing on that, but that particular tonnage is declining at the present time, owing to the fact that the oil refiners have put in recovery systems, and over a period there again I think we have somewhere around 10 percent, I would guess.

Q. What product of the oxides is principally used in the oil refining business?

A. Litharge.

Q. Is that used in making leaded gasoline?

A. No, that is used in sweetening gasoline, the removing of sulphur from gasoline.

Q. You stated on direct examination that 60 percent of your battery sales were to carload customers, that only 10 percent of them were large manufacturers. What do you mean by "large"?

A. In the case of a large manufacturer I was referring to those companies that have multiple manufacturing plants. A battery manufacturer who operated more than one battery plant.

Q. Aren't there some battery companies that are pretty large operations with only one plant?

A. Yes, there are several.

Q. Were you including any of those in there?

A. I guess you would include one in there, yes.

Q. Approximately what annual tonnage would you refer to as being large in point of consumption of these oxides?

A. Well, as a large battery manufacturer, I would
2766 say someone consuming 7,000 to 10,000 tons or more.

Q. A year?

A. A year. Maybe I am a little high on the lower figure.

Q. Would you consider Bowers Battery Company a large battery company?

A. A fairly large battery company. That is why I started to revise my figure when I thought of him.

Q. You spoke of the difficulty that you had in supplying the type of service necessary to keep the large battery companies as accounts. What kind of service do they require?

A. I was referring to our ability to deliver material to them in regular quantities and have it in their plants at the times they want it so there would be no interruption in their operations. That was what I meant by "service" there.

Q. Now, with reference to the exact control of oxides to specifications, you mentioned that as being one of the requirements of selling to a large account. What processes are necessary to control specifications and what specifications do you mean there?

A. I don't recall that I used that particular term. I was referring to, I believe, the specifications of the large manufacturer operating several plants in the manufacture of batteries, where he has the same formula in each plant for making a given type of battery. It requires the same oxides as the raw material in making that battery.

2767 Q. Does that require a uniformity of grind so there is a uniform particle size?

A. Not necessarily uniformity of grind, no. It is the way the oxide reacts in the formation of a battery plate, either positive or negative.

Q. What formula differences are you speaking of now? I want to find that out.

A. Formula differences?

Q. Yes.

A. Formation differences.

Q. You spoke of the different formulas that a battery manufacturer used in each of his plants.

A. Yes.

Q. What are those formula differences? What do you mean by that?

A. The specifications that he had for forming his batteries, what percentage of oxides, the time it took to form that plate or that battery into—that is, to finish off and convert it into an operating battery, the strength of acids that were used, and so on.

Q. What did that require on your part in supplying them?

A. Oxides from different plants react somewhat differently, depending on the process used in making the battery. Adjustments can be made in the battery plants to compensate for it, but where a man has a standard procedure
2768 set up for doing a job, and you change the type of raw material he uses, he has to change his method of processing the raw material.

Q. Those are factors which you can't control in the manufacture of the oxides, then?

A. We can't change our oxides to absolutely duplicate the products made by our competitors.

Q. You have a variety of different grades for performing different functions in accordance with the different tastes of different battery manufacturers, do you not?

A. Yes, we have a variation of oxides, but they don't necessarily conform to the same grades of oxides as made by competitors.

Q. You referred to the fact on direct, I believe, that the carload shipments were always made direct from the plant in carloads and the cost was, therefore, less.

I direct your attention to a series of exhibits which are in the record as Commission's Exhibit 831 with sub numbers. I call your attention to Exhibit 831-A, which is an invoice to the Federal Storage Battery Company, Chicago, showing 10 drums in September, 1941.

That is, apparently, the carload price in effect at that time. I believe it was testified here that the pig lead price then was 5.85 New York.

Mr. Duncan: You are referring to No. 736?

Mr. Wright: 735.

2769 By Mr. Wright:

Q. Is that the carload price? Do you recognize that as being the carload price?

A. 5.85 was the lead market.

Q. Yes.

A. That would be the carload price.

Q. That is the product, Metrox Plumbarge 95-X?

A. Yes.

Q. That is a litharge, is it?

A. That is battery oxide.

Q. This Metrox RM oxide No. 2 at 7.60—does that have 25 percent red lead, 75 percent litharge, for positive plate manufacture?

A. Yes.

Q. It customarily sells at a differential of 25 cents per hundred above the strict litharge price?

A. That is correct.

Q. That 831-A shows shipment of 20 drums. 831-D—

A. (interposing) Doesn't it all refer to the same order?

Q. Different shipping dates on these invoices.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

The Witness: I think that all refers to an order of the Federal Storage Battery Company, one carload order delivered to them over a period, during the period at

2770 least when we were definitely short on oxide production. Our stocks were down, and we delivered them over a period. I think that was what you are referring to.

By Mr. Wright:

Q. I note on No. 831-G, "applies on standing order." Was it customary to put a standing order in that way? With delivery periodically from day to day in less than carload quantities?

A. In truck shipments to Chicago. A customer would place an order, whether for truckload or carload. It would be trucked up there and we would try to deliver those as rapidly as we could. Sometimes we weren't able to get transportation in order to deliver those for days at a time.

Q. I call your attention to the fact that 831-O is an invoice of December 1 of 20 drums, which still refers to "applies on standing order of October 2, 1941."

A. I recall those and the time they were made up. There were some in there where we applied shipments to the

wrong orders in our Accounting Department because we made shipments against one order and then came back and made shipments against the other as far as the invoicing was concerned. I think this is the account.

Q. Please just answer my questions now and don't volunteer.

I show you Commission's Exhibit 831-Z-26, which is an invoice of December 13, 1941, to the Illinois Battery & Electric Company of 11 drums of oxides. Is that
2771 the card price that appears for those positive and negative oxides there?

A. I wouldn't know unless I saw the card. Have you got the card for that time?

Q. I call your attention to the fact that on Commission's Exhibit 831-R to the Federal Storage Battery Company in what you said was the carload price, within three days of that, that the price on the same materials—

A. (interposing) This was the carload price if the lead market was 5.85. I qualified my answer that way.

Q. I understand it is established in the record that that was the price of lead during that period.

A. It depends on whether this price applies to that lead market, as to when that order was accepted in our plant. I don't know whether this—whether there had been a delay in it or not.

Q. Please don't explain these things unless you are asked a question about them.

A. I am sorry.

Q. Was it your custom in making these sales to make a price at the time you accepted the order and to continue shipping over a period of months at that same price irrespective of movement, pig lead market?

A. If we accepted an order for a definite amount of oxide for delivery to a given point, we would make delivery on that tonnage of oxide where we accepted the order at a given price.

2772 Q. On the date that the order was accepted?

A. On the date that the order was accepted.

Q. That is a contractual relationship which is common in the industry?

A. That is right.

Q. Well, now, calling your attention again to this invoice, Commission's Exhibit 831-Z-26, you will notice the Metrox Plumbarge there is $8.25 per ton.

A. Yes.

Q. And $8.50 is for the positive oxide. What transportation differential was there, if you know, involved in shipping 20 drums by truck to the Federal Storage Battery Company and 11 drums by truck to the Illinois Battery & Electric Company?

A. Difference in transportation—they are both located in Chicago?

Q. Yes. What was the cost difference involved in those two transactions?

A. I don't know what the actual cost was on either one of these shipments.

Q. I notice that on 831-O and 831-Z-26 the "via" is by Welch in both instances.

A. I think the freight rate on both of them is identically the same, but you asked me if I knew, and I don't know.

Q. That is the same carrier?

A. Yes.

2773 Q. Does that refer to a local trucking company?

A. Yes.

Q. And they had a set rule for delivery per hundredweight cartage in the city of Chicago?

A. That is right.

Q. Would there be any substantial difference between per hundredweight cartage rate in Chicago between 20 drums and 11 drums?

A. I don't recall the schedule of that trucking contract, but it has breaks in it as to the tonnage that is delivered.

Q. Would it be more than 5 cents a hundredweight difference on those two quantities, in your recollection?

A. I just don't know. I don't think so, but I don't know what it actually was.

Q. You don't know what the local cartage rate is in Chicago from Hammond?

A. No, I don't.

Q. I call your attention now to a shipment indicated as December 3, 1941, on Commission's Exhibit 841-Z-45 to the Bowers Battery Manufacturing Company, Inc., Reading, Pennsylvania, on 63 drums. That, likewise, is the carload price, assuming that 5.85 was the pig lead price at that time. Is that correct?

Mr. Duncan: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

2774 The Witness: Assuming that would be the carload price on the date this order was accepted.

By Mr. Wright:

Q. I call your attention to the fact that the bill of lading or freight bill that is attached to that invoice and appears as No. 831-Z-46 shows the freight rate there of 38 cents per hundredweight on that shipment of Bowers. Do you know whether this particular shipment went prepaid freight or collect?

A. Not unless it shows here on the bill of lading. I don't know which way it went.

Q. In either event, it came out of the price there of 38 cents, did it not?

A. It states on the invoice.

Q. That it was sent freight collect?

A. Freight collect.

Q. In that event, do you have some means of allowing the freight that was paid by the buyer when he received such a shipment as that? The invoice doesn't show any payment of freight back to the buyer.

A. We ship, if it is all right to give you this without a question, we ship on two bases: f. o. b. Hammond, with freight allowance to the customer, and we prepay the freight in those cases where it is difficult for the customer to pay his freight bill and get delivery. We credit the customer's account with the actual amount of the freight.

2775 Q. That he pays as shown by the freight bill?

A. That he pays, and it is returned.

Q. Presumably, you made a credit memorandum for Bowers in the amount of the freight shown on this freight bill as being paid per hundredweight of this material.

A. Yes.

Q. Is there any saving to you in your transportation costs in doing business with Bowers as shown on Commission's Exhibit 831-Z-45 as against 831-Z-26, the transaction with the Illinois Battery & Electric Company?

Mr. Hinds: That is objected to, Your Honor, on the assumption that counsel is sticking to his commitment that we are not going into individual discriminations, and that he is considering discriminations by classes, and in this case I assume between classes of customers, until it first be shown in which general class each of these customers is. I understand that when you justify by classes, you take people as a whole and not as individuals.

Trial Examiner Norwood: Objection overruled. He may answer.

The Witness: Will you read the question, please?

(Question read by reporter.)

The Witness: The carload freight rate from Hammond to Reading in this particular case, which applies to the Bowers shipment, is higher than the truck rate from
2776 Hammond to nearby Chicago.

By Mr. Wright:

Q. In less than carload quantities?

A. In less than carload quantities.

Q. In such instances then, in your sales to the carload customer you actually incur a larger transportation cost than you do in sales to nearby less-than-carload purchasers?

A. I can sell across the street to a man an L. C. L. shipment and the cartage expense on that would be much less than a shipment of a carload of oxides to New York. I don't think there is any comparison.

Q. Isn't it a fact that some of your less-than-carload accounts paid cash on delivery when they purchased oxides from you?

A. I can't answer that question directly. I would say that if that was done, it was because we would not advance him any credit.

Q. In cases of those people who are sold on a cash basis your Credit Department has no further expense in connection with them because there is no credit investigation any more?

Mr. Hinds: Just a moment. That is objected to on the same ground, that where quantity differentials are involved, the customer must be taken by classes, and when you take any other base differential on any other kind of classes, one particular customer may involve very lit-
2777 tle expense, buit if it comes in an expensive class, the differential will apply to him.

In other words, on the class differential you have to take them by classes. I therefore object that the question is immaterial.

Mr. Wright: Your Honor, right there, that is the second objection Mr. Hinds made on the same ground in the last few minutes. I refuse to be jockeyed into the position that we are taking these discriminations by broad general

classes. We have gone into that before, and that just isn't the case.

Trial Examiner Norwood: In any case, that is a question of application which we will have to resolve after a great deal of study, maybe, and discussion.

Mr. Wright: I think it ought to be plain on the record, before counsel finish putting in their defense I want the record to show that he has any thought that I contend only that these are broad general class discriminations and that by the testimony of this witness and Mr. Sprague he can say we found we had larger costs in doing business with less-than-carload customers; therefore, they are justified under the Robinson-Patman Act.

Trial Examiner Norwood: I feel you have a right to bring out this testimony here as to the matters which are brought up by matters of law which will be settled later.

We are bringing out all matters that apply here to 2778 bona fide contentions of either side. It is just a broad investigation. Objection overruled. Please read the question.

(Question read by reporter.)

The Witness: That is correct.

By Mr. Wright:

Q. Regarding this matter of freight and cartage and the different types of customers, I call your attention to Commission's Exhibit 852-B and C, which is a list of storage battery manufacturers purchasing lead oxides from Metals Refining Company from October 1, 1941 to December 31, 1941. Did you have anything to do with preparing that document, Mr. Burruss?

A. I personally had nothing to do with preparing it.

Q. I will tell you that it is in evidence as furnished by the Glidden Company in answer to specific inquiries.

Now, I direct your attention to the fact that the truck rates there on deliveries from Hammond to Chicago and Berwyn and in that local metropolitan area appear to be 15 cents in less-than-carload and in 5-ton lots, and 11 cents in carload lots.

A. That is right.

Q. I also call your attention to the fact that in many instances the transportation charges per hundredweight involved in the less than 5-ton transactions are less than the transportation charges in either the carload or 5-ton lots.

2779 A. Where they are close by.

Q. Where they are close by your plant.

A. Yes.

Q. Now, you stated that you made a survey of some less-than-carload accounts. Was that your testimony?

A. We checked less-than-carload accounts.

Q. How did you check them? What did you do?

A. As far as our shipping expenses or selling expenses were, delivering to the less-than-carload accounts, if that is what you are referring to.

Q. Yes. I am referring now to the matters about which you testified on direct in answer to Mr. Duncan about checking the less-than-carload accounts on various items of expense.

A. Oh, yes.

Q. How did you select the accounts that were subject to that check?

A. I didn't check individual accounts.

Q. What did you do?

A. That is, in making this survey. I inquired of our credit department how much of their expense was involved and applicable to the smaller accounts, the 5-ton, and to the carload buyer.

Q. Do you know how they got that information for you?

A. I don't know exactly how they got it. I assume it was on the basis of the number of calls that were made on a particular account, the amount of correspondence involved.

2780 Q. For all you know it might have been someone's guess or opinion as to what—

Mr. Duncan (interposing): I object to the form of the question. It is in the alternative, either guessing or opinion.

Trial Examiner Norwood: Read the question.

Mr. Wright: I withdraw it.

By Mr. Wright:

Q. As far as you know, it might have been someone's opinion in the credit department as to how much of the time was spent in the various accounts?

A. I think we have reliable employees, and they give me the information that I ask for rather than a guess.

Q. You don't know how they might have obtained that information, do you?

A. No.

Q. Or what processes they might have gone through to get it?

A. I do not.

Q. Or what records they had available from which it could be secured?

A. No.

Q. Was that in the form of a written report?

A. No, that was in the form of a verbal statement from our credit department.

Q. And that purported to cover all your L. C. L. 2781 accounts both the 5-ton lots and less than 5-ton lots—those customers?

A. Yes.

Q. Do you make any distinction between the two as to the expenses between the two?

A. I don't recall that they made any distinction between the 5-ton and the less than 5-ton.

Q. Your information about selling expense—is that in the same category?

A. Selling expense is the same way.

Q. In other words, the basis of your information is the same?

A. That is right.

Q. And the expense of servicing the accounts—is that in the same category?

A. Yes.

Q. And as to warehousing expense on the lead oxides—is that in the same category?

A. That was a report that we had in our Chemical and Pigment Division.

Q. You are referring to lithopone reports?

A. The lithopone report.

Q. But as to any information on oxides, you have no more specific information than that which you referred to from the credit department and from the sales department?

2782 A. That is right.

Q. In what industry is lithopone sold?

A. Largely the paint industry.

Q. And your L.C.L. customers for oxides are primarily in the battery industry?

A. Largely, yes.

Mr. Wright: I have no further examination.

Mr. Duncan: I have no redirect, Your Honor.

Trial Examiner Norwood: Thank you Mr. Burruss. You are excused.

(Witness excused.)

Mr. Duncan: We have no further evidence to offer on behalf of the Glidden Company at this time, Your Honor, but we want to reserve on behalf of Glidden the right to introduce further testimony or recall the witnesses whom we have already produced here. We also reserve the right to introduce further exhibits.

Trial Examiner Norwood: You have that right under our procedure.

Mr. Duncan: Thank you.

Trial Examiner Norwood: What is your further pleasure?

Mr. Ewing: As we discussed last week, our plan would be to proceed here on the 10th of June, acts of God and public enemy excepted.

2783 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: The hearing is recessed until 9:00 o'clock a.m., Eastern Standard Time, 10:00 o'clock District Time, on June 10, 1947, in room 332, office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 4:10 p.m., the hearing was recessed until 9:00 a.m. Eastern Standard Time, 10:00 a.m. District Time, June 10, 1947.)

2784

Room 332, Federal Trade Commission Building,
Washington, D. C.,
Tuesday, June 10, 1947.

Met, pursuant to adjournment, at 10:00 a.m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and
Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick, & Richardson, 815 15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2785

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on May 15, the hearing in Docket 5253, National Lead Company, et al., is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10:00 a.m., Eastern Daylight Saving Time, on the 10th day of June, 1947.

The reporter will note the appearances.

I suppose that it is in order this morning for me to rule

on the motion to strike. Both Mr. Wright and the counsel for Glidden have filed memorandum arguments with me, and I suppose that it is agreeable to counsel not to put those documents in the record.

Mr. Wright: Well, won't those briefs go in the record under the new Rules, Your Honor?

Trial Examiner Norwood: They can be left out by agreement. You may make your motion for the record here.

Mr. Wright: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: Your Honor, I move that the testimony of the witness David N. Burruss, Jr., beginning in the transcript at line 5, on page 2738, and continuing through line 18 on page 2754, which is the direct testimony, and the testimony of the same witness on cross-examination 2786 beginning at line 4, page 2779, and ending at line 6 on page 2782, be stricken from the record.

I would also like to move that the testimony of the witness Sprague, lines 17, 18 and 19 on page 2551; and the further testimony of the witness Sprague beginning with the words, "But facing", on line 5 of page 2710 and continuing through line 19 of the same page; and the further testimony of the witness Sprague beginning at line 21 of page 2721 and continuing through line 4 of page 2725; and the further testimony of the witness Sprague beginning at line 2 of page 2729 and continuing through line 9 of page 2730, be stricken from the record.

The grounds of the motion are that this testimony was improperly admitted, being incompetent to prove justification for discriminations under Section 2(a) in the record, and that it was hearsay, opinion testimony based upon facts and records which were not available for purposes of cross-examination, and which were not within the personal knowledge of the witnesses.

Trial Examiner Norwood: This motion to strike the testimony of the witness Sprague is a new motion.

Mr. Ewing: That is correct.

Trial Examiner Norwood: We will have to take that under consideration, and we can discuss it further when I have seen the record and seen the particular lines 2787 involved. But counsel may go ahead now and discuss

his motion to strike the testimony of the witness Burruss.

Mr. Wright: Your Honor, I want to say—

Trial Examiner Norwood: (Interposing.) The two memorandum briefs that have been filed here, one by counsel in support of the complaint and one by counsel for Glidden, may go in the record. I do not think it is necessary to copy them in the transcript here. But I would like counsel to state the substance of their contentions for the record here so as to bring the matter forward.

Mr. Wright: Your Honor, I would like to say first of all that while the motion as I originally filed it did not relate to the testimony of the witness Sprague, on reexamination of the record I have found that the testimony of the witness Sprague was in exactly the same category, so that my contentions in the memorandum brief in support of the motion as to the testimony of the witness Burruss are equally applicable to the testimony of the witness Sprague. In both instances the record is perfectly clear that neither of these gentlemen had any firsthand knowledge of the records and books of the company to know definitely that the costs of doing business with the various categories of customers were as was testified.

Now I will call your attention to the statement of Mr. Burruss on cross-examination, on page 2779 through 2788 2781, where he stated that he did not check any individual accounts in determining these costs. He inquired of the Credit Department and of the other departments as to what their costs were. He did not know the basis of the information which he received then from the Credit and other departments, to the effect that the costs of doing business with the less-than-carload customers were higher than with the carload customers.

In answer to a question as to whether he knew that it might have been someone's guess or opinion in the Credit Department as to how much time was spent in checking the various accounts, the best answer he could make was, "I think we have reliable employees, and they give me the information that I ask for rather than a guess." But in answer to the specific question as to whether he knew how they obtained the information, he said no; and he stated, with reference to all the other items of expense, that they were in exactly the same category as the credit information, excepting as to warehousing expense, and there he vaguely testified that there had been a specific study made

as to lithophone. He did not have that study in his possession, and there was no showing in the record that the warehousing expense as to lithopone was in the same category as it was as to the products involved in this case.

Trial Examiner Norwood: Just make your general argument, because we will go over the items—

Mr. Wright: (Interposing.) It did not appear
2789 until this cross-examination came up that this was outright hearsay and that the witness had no direct knowledge of his own upon which to base that testimony. For that reason, I am seriously urging this motion to strike.

We have in this instance a peculiar statutory provision which places a positive burden on the respondents, having possession of the records from which these facts may be determined, to come forward and prove any justification on a cost basis, if they have one. To permit this testimony to remain in the record will be to wrongfully, on the basis of hearsay and opinion testimony, shift that burden back to counsel for the Commission to prove that there was no justification, from records which are in the possession of the Glidden Company. Now there was some testimony that the Glidden Company has no records from which it could be determined what their costs were. Well, it is a matter of common knowledge that a large corporation such as The Glidden Company has very accurate and complete records of its daily transactions, and certainly there should be a more substantial showing of an impossibility of producing those records and bringing in this information.

Mr. Ewing: As Your Honor has said, it was not the intention of counsel for Glidden to make any argument on this motion or in opposition to it, but since I am acting for them in this particular regard I think perhaps I should
state for the record the basic grounds of their oppo-
2790 sition which appear in the brief, and these are:

Glidden submits that the motion should be denied for the following reasons:

(1) The testimony (Appendix A) sought to be stricken was properly and fairly admitted inasmuch as it was competent and met the three practical and fundamental tests of the logical relevancy, reliability, and fairness.

(2) To strike such testimony would work irreparable injury to respondent Glidden, and would be highly prejudicial and would not make for a fair hearing.

(3) Even if such evidence was hearsay, which we deny, Burruss' testimony (Appendix A) possessed a moderate degree of reliability required for its admission, and its reception by the Examiner was entirely proper.

(4) Complainant's counsel was not deprived of his right to fully cross-examine the witness Burruss.

(5) The evidence should be permitted to remain in the record inasmuch as the estimates are, to use the words of the Examiner, "from these men who conduct the business and who have to do business, or at least who do business on these estimates * * * they may come in for whatever they are worth. Any objection to their not being accurate surveys would go to the weight."

And on the further ground, as supported by the decision of the Circuit Court of Appeals for the 7th Circuit
2791 in the Morton Salt case, decided on May 27, 1947, with which Your Honor is familiar.

I take it that as far as the motion with respect to Mr. Sprague's testimony is concerned, we will be given an appropriate opportunity to answer it after we have had a chance to look at the portions of the record objected to.

Trial Examiner Norwood: That is right.

Mr. Wright: Your Honor, I fail to see what there is in the Morton Salt Company case which relates to this particular problem here. The essence of my objection is that I have been completely deprived of my right to cross-examine as to the factors and the basis of this testimony. These witnesses had no facts on which they could be tested. As Your Honor stated in his paper on Administrative Evidence in the George Washington Law Review, "General statements and incomplete data as to costs, profits, sales, and the like, offered by a party who has custody of complete records, not available to the opposing party, should be rejected as unreliable, for it may be inferred that the entire story would be against the offerer."

Trial Examiner Norwood: I have read both memorandum briefs, and read the motion, and the material that went with it, of Mr. Wright, and also the very thorough and well gotten up brief of Mr. Duncan. I have also read the record covered by the motion, and we will con-
2792 sider these items as we come to them.

At page 2738, line 5, I see nothing to strike there—

Mr. Wright: (Interposing.) Your Honor, I don't know what your ruling is on the motion, but the questions and answers beginning on line 5 of page 2738 presumably all

were based upon the estimates that the witness Burruss got from the heads of the various departments of Glidden, as the answer which continues on in line 9 will show, so that the whole statement, his whole answer that the carload business yielded the greater net profit, was apparently based on this—

Trial Examiner Norwood: (Interposing.) Well, the point I am considering in this thing is that this is general information which this witness would know as to whether or not—in fact, I think anybody knows it without listening to a witness saying that he gets more profit out of a carload than the less-than-carload, and that the freight per pound is less on carload business than on less-than-carload business.

Mr. Wright: There is no question about that. I would be willing to stipulate that the expenses on the carload business are probably less than they are on the less-than-carload business. But here is a question that went to the net profit on the various lines, and the witness has already testified that they made no examination of their books of account to determine that.

Trial Examiner Norwood: I understand that, but
2793 he has a right to give us these details about his business, and I shall accept that and consider it as going to his motivation for meeting the other fellow's price, and as going to the question of whether or not he named his prices by agreement or named them because of competitive situations, and so on. I wouldn't strike that testimony there. He has a right to tell us that, and he has a right to have us consider it, and I see nothing here that could be taken as justifying an alleged price discrimination. So I will deny the motion as to that passage.

Now coming down to page 2742, beginning at line 5—

Mr. Wright: (Interposing) Your Honor, I direct your attention to the answer that appears beginning at line 3 on page 2739. In addition to relating that there were several additional costs, including freight and clerical work, warehousing and credit investigations being most of it, where he stated, "credit losses in connection with that particular class of trade made up most of our" credit expenses —now that is something which can be determined by the records of the company. As shown by his cross-examination, he had no information on that subject except what the credit manager told him. Now there he is allocating all the credit costs to the less-than-carload accounts.

Now what the credit costs of the company were over any period, and to what customers they could prop-
2794 erly be allocated, is something which can be determined by competent evidence and without any undue burden on the respondent.

Trial Examiner Norwood: All he is doing is comparing these two classes of business. He isn't giving anything definite that could be taken into our calculations as justifying cost discrimination. He is testifying, as between the two classes, which one costs the most—

Mr. Wright: (Interposing.) After detailing all of the various items of additional expense in connection with smaller customers, he said credit investigation is most of it. In other words, that is most of the additional expense. And "in connection with that particular class of trade * * * most of our expense in that connection." In other words, credit investigation is the largest items of expense, and that class of customers accounts for most of it. There is an allocation or a purported allocation.

Now these are things which can be determined with a degree of certainty. I had no opportunity of cross-examining as to what their credit expenses were. This witness didn't know, he had no figures on credit expense, credit investigations,—on nothing. As soon as he answered, on the stand, that he had no information, there was no further cross-examination possible.

Trial Examiner Norwood: Now on page 2779, beginning there, that refers to this item here.

2795 Mr. Wright: Yes, sir.

Trial Examiner Norwood: I will allow the motion to strike lines 3 to 9 on page 2739, in view of the statements of this witness contained on page 2779, and following, respecting these costs.

Now on page 2742—do you have anything prior to that?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: What is it?

Mr. Wright: The answer which appears on lines 14, 15 and 16 of page 2739, "Yes, the more accounts you solicit in that case", and following, winding up with the statement, "your selling expenses are much higher." This witness had no factual basis for stating that selling expenses were much higher.

Trial Examiner Norwood: I will allow the motion to strike lines 14 to 16 on page 2739.

What is your next item?

Mr. Wright: I would like to strike the material appearing in the answer starting at line 19 and running through line 25 of page 2739. You will note there a statement that the difference between the LCL and the carload freight rate runs on the average 25 cents a hundred. Now obviously this witness had no information on that, as appears in his cross-examination. It appeared in the cross-examina-
2796 tion that he didn't know the difference between various freight rates, even the local cartage rates in the City of Chicago. That answer purports to account for 50% of the difference between the carload and the 5-ton price.

Trial Examiner Norwood: Is that covered by statements following page 2779?

Mr. Wright: It is covered by his answer that appears on line 17, that he didn't check any individual accounts; and there are other portions of the cross-examination which I can find, in which the witness didn't know what freight rates were, wasn't aware of what the difference in the cartage rate to the City of Chicago between less carload, and carload, was. And he had no basis there for any study which would determine on the basis of the business that Glidden did, that their costs on LCL shipments were 25 cents a hundredweight higher.

Trial Examiner Norwood: I see. The motion is allowed, to strike lines 19 to 25 on page 2739.

Mr. Ewing: I would like to direct Your Honor's attention to the fact that there was no objection to this testimony that you are striking, at the time it was given.

Trial Examiner Norwood: It was not until cross-examination that it appeared that the witness had no basis for the statement.

Mr. Ewing: We had some basis, because page 2779 shows he made some check. And after all, he is running the
2797 business, he knows something about it, even though he may not know exact figures. You can't run a business and not know something about the business.

Trial Examiner Norwood: He tells down here how he made this. He said he "inquired of our credit department how much of their expense was involved and applicable to the smaller accounts".

Mr. Ewing: I think that all goes to the weight and not to the admissibility. I think, as you said at the time, it is admissible for what it is worth.

Trial Examiner: But this shows on the face of it that

they do have some information that these people who reported this to him could come here and tell us about. That didn't appear to me until just before we adjourned, in the last few pages, and I don't see how I can—

Mr. Wright: (Interposing) I will say it didn't appear to me what the purpose of this testimony was, either, until we got down, as appears on page 2742 of the transcript, where I made an objection to the whole line of testimony if it were for the purpose of showing costs of the company, beginning at line 22. Your Honor overruled that objection on the ground that they were estimates that these witnesses themselves knew about, as appears on page 2743. It didn't appear until cross-examination that they were estimates by other people which were related to the witness.

2798 Trial Examiner Norwood: I am going to make a correction there, as to the last material struck. Make it line 24, that is, that part of line 24 which ends with "carload of oxides." Everything there above that is struck, up to line 19. This other material, I see no harm in leaving it in, because it is material which the witness would know.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

What is the next one, Mr. Wright?

Mr. Wright: I would like to strike everything now starting at line 24 on page 2741, and continuing on through. You will notice that on page 2742, the witness said, on line 2, "Yes. We checked on sales that we have made to some of these LCL accounts."

And then, on his cross-examination, he stated that he didn't check any LCL accounts; and all of the subsequent testimony there is based upon that purported checking of accounts.

Mr. Ewing: He testified on page 2779, in answer to your question, "We checked less-than-carload accounts." That is on line 6.

Mr. Wright: And then he stated immediately afterwards, "I didn't check individual accounts."

2799 Mr. Ewing: He said, "I didn't check individual accounts." He certainly testified that he checked less-than-carload accounts.

Trial Examiner Norwood: We are skipping now to page 2742, line 3; is that what you want struck?

Mr. Wright: No, sir. I want to start striking at page

2741, line 24, on through continuously until we get over to page 2754.

Trial Examiner Norwood: Well, I will not strike his statement there that they checked, because that is necessary to explain what comes afterwards; but I am going to strike that from line 5 to line 8.

Mr. Wright: That is satisfactory, Your Honor.

Trial Examiner Norwood: In view of his subsequent statements there as to the basis of that information, that is, I am considering that.

Mr. Wright: That is page 2742, lines 5 through 8, inclusive?

Trial Examiner Norwood: Yes.

Mr. Wright: The next answer is in the same category, the one beginning at line 11 and continuing through line 16, of page 2742, including the statement, "our expenses in connection with those have been much greater than in connection with the large buyers."

Mr. Ewing: I would say that a witness in M.
2800 Burruss' position would obviously know in a general way, and that is all he is testifying, in a general way that the expenses to a certain class are much greater than they are to another class.

Mr. Wright: Well, Your Honor, what their expenses were can be determined from their books and records. I can't cross-examine the witness as to what their expenses were, because he didn't know.

Mr. Ewing: He knew they were much greater.

Trial Examiner Norwood: Did you bring out anything on cross about those expenses?

Mr. Wright: Yes, sir. Now this sentence refers to credit investigations again, about which Your Honor has already granted the motion. You can see it reads, "they have been comparatively poor credit risks and entailed an awful lot of follow-up in order to collect on sales we have made, and our expenses in connection with those have been much greater than in connection with the larger buyers."

Then immediately counsel asked him whether that overcame and justified the differential which they made, the next question. The purpose of this, we had to infer until counsel for respondents filed a brief in which they contended that this evidence constitutes a valid cost justification for the discriminations shown in the record. They stated that it was their feeling that the Commission could make findings on the basis of it.

2801 Trial Examiner Norwood: Well, in view of the witness' subsequent statement, I will grant the motion to strike, beginning in line 14 on page 2742; strike that portion reading "and our expenses in connection with those have been much greater than in connection with the larger buyers."

2802 Mr. Wright: Your Honor, with reference to the material now which starts at line 11 here, this is what must be opinion evidence, it can't be anything else since the man testified on cross examination that he didn't know what the actual facts were from the records of the company—

Trial Examiner Norwood: (Interposing): This man was in charge of sales, wasn't he?

Mr. Ewing: That is what my point was before, that here is a man running this particular branch of the business, and he knows something about it. Obviously he knows something about it.

Trial Examiner Norwood: It is difficult just where to draw the line.

Mr. Ewing: He may not know the figures to a penny but he certainly knows about what part of his business is expensive and what part isn't.

Trial Examiner Norwood: I shouldn't permit him to say that these expenses just about offset those other expenses when he testifies that he doesn't know either one.

We will take a two minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Mr. Wright: The material beginning at line 17 and running through line 21 of page 2743 should be stricken.

Trial Examiner Norwood: That is merely a ques-
2803 tion there which he didn't answer.

Mr. Wright: Page 2743, Your Honor. On 2742 the question from 17 to 20 was asked, and the answer appears on 2743, lines 17 through 21, where it was stated that the "added differential did not compensate for the expense in connection with handling that business."

Trial Examiner Norwood: The motion is allowed. Strike lines 17 through 21 on page 2743. What is the next?

Mr. Wright: Lines 6 and 7 on page 2744. That answer must have been based on some factual analysis by the credit department which certainly wasn't available for cross examination.

Mr. Ewing: It wouldn't have taken much factual analysis to know that a loss in a certain class of business existed.

Trial Examiner Norwood: The question asked him what his investigation disclosed, and his testimony on cross examination is that he made no investigation personally. That comes under the same category as the others.

Mr. Ewing: Well, he testified on cross-examination, Judge, that he checked less-than-carload lots.

Trial Examiner Norwood: I think when you run it out you will find that the foundation gives away.

Mr. Wright: How could he check less-than-carload accounts when he didn't check individual accounts. In order to get to the whole you have got to start with the parts.

2804 Mr. Ewing: Not necessarily, if you know something about the business.

Trial Examiner Norwood: Do you want the question and the answer stricken?

Mr. Wright: Yes sir.

Trial Examiner Norwood: Motion allowed. On page 2744 strike lines 3 to 7 inclusive. What is the next?

Mr. Wright: The question and answer beginning at line 8 and extending through line 14.

Trial Examiner Norwood: Is that covered by the witness' statements following page 2779?

Mr. Wright: Yes sir. That deals with the item of credit losses about which he was particularly examined there to determine what his investigation had been.

Trial Examiner Norwood: The motion is allowed. On the same page, 2744, strike lines 8 throug 14, inclusive.

Mr. Wright: The next is on page 2745, lines 1 through 6. In that connection you will note that the witness at the bottom of page 2744 said he had no exact figures or nothing from the records, and the next question requested his judgment.

Trial Examiner Norwood: The motion is allowed. On page 2745 strike lines 1 through 6.

Mr. Ewing: I would like to note there again, Your Honor, that the question which was "What is your

2805 judgment on the matter generally?" was not objected to, and certainly that question could have been objected to on the ground now indicated, if counsel had wished to, at the time, and in this case it was made very clear at the beginning that objections had to be taken at the time. Here is a mass of testimony to which no objection was

taken in large part, and now later a motion is made to strike it.

Mr. Wright: There was an objection to the whole line of testimony as being an improper way of putting in this cost material.

Mr. Ewing: It bears on the question of the intent in this company in doing business, and it bears on the question of how they arrived at these figures.

Trial Examiner Norwood: This will have to come out because in view of his subsequent statements he couldn't make any definite statement about that.

Mr. Wright: I would like to strike from line 15, on page 2746—

Trial Examiner Norwood (Interposing): I don't see anything there to strike. Do you mean from line 15 to the remainder of the page?

Mr. Wright: No sir. I think we can handle all this next part together, since it all relates to one subject, from line 15 on page 2746, down through line 10 on page 2752. All
of that testimony related to some sort of survey which
2806 the witness stated had been made on the warehousing expenses for lithopone, and there were no supporting data, there was nothing available for cross examination on that study. The witness was not familiar with the details of it; he didn't have any written study available for purposes of cross examination and he had not made the study himself personally. It all relates to that one point.

Trial Examiner Norwood: What line did you specify on page 2752?

Mr. Wright: I said line 10, but it should be line 9, I believe. Following that the witness was examined on another subject.

Mr. Ewing: In order not to prolong this particular phase I simply make the comment now that it would seem to me to be wholly improper to strike the questions in any event. I submit that none of this testimony with respect to lithopone should be stricken, but certainly it is not proper to strike the questions as well as the answers. Counsel was entitled to put the questions and there were objections to some of this lithopone testimony and they were ruled on at the time, and that is one thing depending on how they were ruled on, but certainly the questions shouldn't be stricken.

Trial Examiner Norwood: That point wasn't raised a while ago, but I had it in the back of my head at the time.

Mr. Ewing: This particular subject of lithopone
2807 was given some detailed consideration at the time.

Mr. Wright: As I understand it, under our procedure the material is not stricken physically from the record so that all the basic data upon which the ruling is based is preserved in the record; so it seems immaterial whether the questions are included in the stricken material or not. They will remain in the record.

Trial Examiner Norwood: I think the questions may stand on the ground that some men may ask questions that wise men can't answer.

Mr. Wright: I have no objection to leaving the questions in the record.

Trial Examiner Norwood: I will allow the motion to strike all the answers of the witness appearing in the transcript from line 15 on page 2745 through line 9 on page 2752.

Now as to this cross examination I don't think that should be stricken. Is there any reason why you want that stricken?

Mr. Wright: Your Honor, there is a further objection before coming to that. On 2754, the answer appearing at lines 15 through 18 is in the same category.

Mr. Ewing: I would suggest that the question there is, "But from your experience can you make a fairly reliable approximation?"

Mr. Wright: Well, it appeared on cross exami-
2808 nation later that the witness had no information on freight rates and he couldn't be cross examined about that.

Trial Examiner Norwood: The point about that is that he is making a comparison between amounts or figures or costs there and he doesn't know either one, so I think that that will have to come out, the answer appearing from lines 15 through 18 on page 2754.

Unless there is some good reason I shall deny the motion to strike the rest of it, that is, line 4, page 2779 through page 2782, line 6.

Mr. Wright: I have no objection to permitting the cross examination to remain in the record in the present state.

Trial Examiner Norwood: Call your witness.

Mr. Ewing: Might I note for the record an exception on behalf of Glidden to your rulings adverse to Glidden?

Trial Examiner Norwood: Yes.

Mr. Ewing: Mr. Tibbets.

ALBERT B. TIBBETS was thereupon called as a witness for the respondent National Lead Company, and having been first duly sworn, testified as follows:

Trial Examiner Norwod: State your full name.
The Witness: Albert B. Tibbets.

2809 *Direct Examination by Mr. Ewing.*

Q. Mr. Tibbets, by whom are you employed?
A. National Lead Company.
Q. In what capacity are you now employed by National Lead?
A. Sales Promotion Manager.
Q. When were you first employed by National Lead?
A. January, 1919.
Q. What was the nature of your first employment?
A. Assistant in the Advertising Department.
Q. How long did you continue to work in that capacity?
A. About seven years.
Q. In what capacity were you employed at the termination of that period?
A. The same, Assistant in the Advertising Department.
Q. How long did you remain in the Advertising Department?
A. About seven years.
Q. What was your next connection with the company?
A. Well, I was away a year as Sales Promotion Manager of the Butterick Publishing Company, and then I returned to do promotion work.
Q. In what department?
A. Well, I served under the Vice President in promotion work.
Q. What connection, if any, have you had with National Lead Company's white lead-in-oil business?
A. Well, I have served of course in the Advertis-
2810 ing Department in helping advertising promotion, and promoting and Secretary of the Sales Committee.
Q. When did you become Secretary of the Sales Committee, approximately?
A. I think I have my experience record here. 1928.
Q. Are you still connected with the Sales Committee?
A. Yes sir, in the same capacity.

Q. What connection, if any, have you had with the National Lead Company's business relating to lead oxides?

A. As Secretary of the Oxide Committee.

Q. How long have you been Secretary of the Oxide Committee?

A. I dont' know. Offhand, since about 1934—no, wait a minute, pardon me, I will change that. At the time that I was made Secretary of the Sales Committee that took in the Oxide Committee, and later on it was split into two committees and I don't remember just the date that was.

Q. I show you a copy of a map which has been marked in evidence as Commission's Exhibit 580, and ask you whether you are familiar with that map?

A. Yes sir.

Q. I show you photostatic copies of 14 pages which have been marked in evidence in this case as Commission's Exhibit 659-C to -P, inclusive, and ask you if you are familiar with that document?

A. Yes sir.

2811 Mr. Ewing: I ask that this document be marked Respondents' Exhibit 147 for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Respondents' Exhibit 147 for identification.)

By Mr. Ewing:

Q. Now Mr. Tibbets, I show you this map of the United States in which certain areas are colored, and upon which certain legends appear, and which has just been marked Respondents' Exhibit 147 for identification, and ask you to state whether you prepared this map at my request?

A. Yes sir.

Q. Do the territorial areas depicted on this map portray the territories which are set forth in color on Commission's Exhibit 580?

A. Yes sir.

2812 Q. In preparing the large map in your hands which has been marked Respondents' Exhibit 147 for identification, if you use as a basis the small map which is a copy of Commission's Exhibit 580 for the purpose of portraying on Respondents' Exhibit 147 for identification the territorial divisions shown on Commission's Exhibit 580?

Mr. Wright: Objection, your Honor. I believe the witness can be asked the circumstances of his preparation without being led by counsel.

Trial Examiner Norwood: I think that is more or less preliminary.

Mr. Ewing: It is all preliminary.

Trial Examiner Norwood: I think so.

Mr. Ewing: There is no peculiar significance or anything magical or mysterious about it. I just want the record to show in brief form.

The Witness: Yes, sir.

By Mr. Ewing:

Q. Now, I direct your attention to the large map which has been marked Respondents' Exhibit 147 for identification and, in particular, to the legends which appear thereon in the white square boxes.

They are not white on your Honor's copy, but they are square boxes.

I ask you to state what those legends represent.

2813. A. Those are the freight differentials in each zone.

Q. What?

A. Freight differentials.

Q. Do you mean by that that they are the differentials shown on Commission's Exhibit 580 for the territories in the particular color to which they are attached?

A. Yes, sir.

Q. Are the differentials portrayed on the large map, Respondents' Exhibit No. 147 for identification, the same as those shown on Commission's Exhibit 580, of which you have a copy?

A. Yes, sir.

Q. Now, I direct your attention again to Commission's Exhibit 659-C to -P, inclusive, and ask you to state whether the differential points shown on that exhibit are identified on Respondents' Exhibit 147 for identification in any way?

A. Yes, these are shown in red ink and the points are indicated by the red ink, underscored.

Q. Are all of the points shown as differential points on Commission's Exhibit 659-C to -P, inclusive, identified upon Respondents' Exhibit 147 for identification?

A. That is this large map?

Q. That is correct.

A. Yes, sir.

Q. Now, I call your attention to the fact that on
2814 the large map, Respondents' Exhibit 147 for identification, alongside each of the differential points iden-

tified, I believe you said, by underscoring, is a legend such as "1/4th" or "1/8th", as the case may be; and I ask you to state what those legends represent.

A. Freight differentials.

Q. For what purpose did you prepare Respondents' Exhibit 147 for identification?—The large map.

A. To show the differentials in effect some years ago as compared to the present differentials in colored zones, that is, indicated here by colors.

Q. Now, are the differentials and differential points shown on the large map which you prepared, Respondents' Exhibit 147 for identification, the same differential points and differentials set forth in Commission's Exhibit 659-C to -P, inclusive?

A. Now, I am making comparison between the red inks and the colored sections?

Q. No. Are these differential points which are underscored towns or cities and the accompanying fractional differentials the same differential points and fractional differentials as are contained in Commission's Exhibit 659-C to -P, inclusive?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 147 for 2815 identification, in evidence.

Mr. Wright: Your Honor, this is a derivation of two exhibits which are already in the record. I don't see that it adds anything to the record. It is really something which is more a briefing matter. I have no objection, however.

Trial Examiner Norwood: He is to make that the basis of his further testimony, is he not?

Mr. Ewing: That is correct.

Trial Examiner Norwood: Received as marked. Objection overruled.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 147, was received in evidence.)

Mr. Ewing: I might say off the record—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Now, I ask that the three sheets be marked Respondents' Exhibit 148-A to -C for identification.

(The papers referred to were marked Respondents' Exhibit 148-A through 148-C for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 148-A to -C for identification, Mr. Tibbets, and ask whether that was
2816 prepared by you or under your direction?

A. That was prepared by me.

Q. Now, I call your attention again to Commission's Exhibit 659-C to -P, inclusive, and ask you to state whether you prepared Respondents' Exhibit 148-A to -C for identification from the information contained in Commission's Exhibit 659-C to -P, inclusive.

A. Yes, sir.

Q. Are all of the delivery and equalization points shown in Commission's Exhibit 659-C to -P, inclusive, shown on these three documents which you have prepared and which have been marked Respondents' Exhibit 148-A to -C, inclusive, for identification?

A. Yes, sir.

Q. Will you tell us whether you show on Respondents' Exhibit 148-A to -C, for identification, the differential per hundredweight under the sales methods employed by National Lead Company prior to the use by National Lead Company of the present zone may substantially similar to Commission's Exhibit 580 for identification in connection with the sale and distribution of white lead-in-oil?

Mr. Wright: May I have that question read?

Trial Examiner Norwood: Read it.

(The reporter read the question.)

Mr. Wright: I object to that question, your
2817 Honor, for the reason that it calls for several conclusions from the witness.

Now, as I had understood these questions they related only to whether the information was derived from these other two exhibits here; and insofar as the questions were based on a relation of those exhibits—580, 659, 147—to this, I have no objection to it; but counsel has characterized several things there regarding the method of selling which I object to.

Mr. Ewing: I only want to identify the point of time. It doesn't call for any conclusion; simply calls for him to state whether this exhibit shows the differential—that is, Your Honor, the so-called old system, or not.

Mr. Wright: I object to that characterization, your Honor. I have no objection to this, showing the differentials as they appear in Commission's Exhibit 659 and the

differentials as they appear in Commission's Exhibit 580, but I do object at this point, under the qualification of this witness, to his characterizing what National did then and what they do now.

Mr. Ewing: I am perfectly content to have the record show that what he calls my characterization is simply a method of identification which has no significance whatever.

Trial Examiner Norwood: I think the question is involved. I should be much happier for counsel to reframe it.

2818 Mr. Ewing: I should be glad to rephrase it.

By Mr. Ewing:

Q. On these three sheets which you prepared and which have been marked Respondents' Exhibit 148-A to -C for identification, there is a heading in the middle, "Differential per cwt." and underneath that the words, "Old System." Will you tell us what the figures in that column are?

A. They are freight differentials at differential points, taken from this—whatever—What is this? 659-C—

Q. -C to -P, inclusive.

Now, will you tell us, Mr. Tibbets, what you mean when you say "freight differential"?

A. It is the freight differential charged the customer at those points or in those zones.

Q. Does it represent actual freight with respect to any particular customer or any particular shipment?

A. No.

Q. Now, I call your attention to the same exhibit and to the column headed "Differential per cwt." under which there appears the quoted words "Zone System" and ask you what those figures represent?

A. Those are freight differentials in the zones shown on this, whatever exhibit this is.

Mr. Ewing: Commission's Exhibit 580.

I offer Respondents' Exhibit 148-A to -C for identi-
2819 fication in evidence.

Mr. Wright: I should like to request a short voir dire on the identification here.

I call your attention to the heading under "National Lead Company." "The following shows the differential charged at all delivery and equalization points under the old system of selling," et cetera.

From where did you get that information, Mr. Tibbets?

The Witness: From this exhibit here.

Mr. Ewing: Indicating Commission's Exhibit 659-C to -P, inclusive.

Mr. Wright: You made no independent check of any other records to determine whether or not these were all the delivery points quoted by the National Lead Company prior to going on the zone method?

The Witness: They were all the differential points.

Mr. Wright: You know that, do you?

The Witness: From this record.

Mr. Wright: From that record; but you examined no other records, did you, to determine whether or not they might be all—

The Witness: No, sir.

Mr. Wright: So that the sole source of your in-
2820 formation is as appears on the exhibits themselves?

The Witness: That is right.

Mr. Wright: Now, I direct your attention to the statement on 148-C, average differential per hundredweight, 123 cities and the figures following. From where did you get that?

The Witness: From my own calculation of counting up this.

Mr. Wright: In other words, you made a calculation from these figures then?

The Witness: Yes, sir.

Mr. Wright: How about the material directly below that on 148-C, in changing over to present zone system differentials charged, 71 at 123 cities, et cetera?

From where did you obtain that information?

The Witness: From this same information.

Mr. Wright: That was your own conclusion?

The Witness: That is right. That is calculation.

Mr. Wright: Your Honor, I object to the reception of this document in evidence since it obviously contains conclusions and characterizations by this witness which he has not been qualified to make, and it is a misleading document to have in the record with these characterizations which appear upon it.

Mr. Ewing: The characterizations are solely for
2821 the purpose of making available an easy way of seeing what the material is. The purpose of the offer is to set forth in concise form the information which is already in the record in these other exhibits so that

at a glance you may compare the differentials based upon the territorial divisions that this company has employed.

Mr. Wright: Your Honor, I direct your attention—

Mr. Ewing: We are charged with a conspiracy commenced in 1933, and I propose to show that substantially the same method of distributing white lead-in-oil has been used since the inception of the company.

Mr. Wright: Your Honor, I am objecting at this point to these averages.

Mr. Ewing: That is a matter of arithmetic.

Mr. Wright: He has put some averages in here which are a very misleading proposition. It has not been established that there was any weighting of these averages to show any significance of them. These are points on 148-C that are properly part of Respondents' brief. They are contentions which can be made from the basic evidence.

Mr. Ewing: It is simply arithmetical calculations.

Trial Examiner Norwood: That has its basis in the record?

Mr. Ewing: That is correct.

Mr. Wright: It is in the record, except these 2822 conclusions.

Mr. Ewing: The conclusions are a matter of arithmetic.

Trial Examiner Norwood: Do you mean the conclusions contained in the headlines and some of the terms there?

Mr. Wright: At the bottom of it, where the witness has added his conclusion: "The average differential per hundredweight in 123 cities, under the old system was .397."

Mr. Ewing: He added up a column and divided by 123.

Trial Examiner Norwood: I have never taken one of these tabulations—and they are so useful, ordinarily; the majority of them are very useful—I have never taken a one of them without limiting the use of those characterizations. They are always objectionable to the other side.

Mr. Wright: I have not checked the accuracy of this man's work. Obviously, what he has done is taken two exhibits—which anyone can do—and set down some figures.

Mr. Ewing: If there are any mistakes, we should be happy to correct them.

Mr. Wright: They can be checked for accuracy afterwards. I do object to conclusions.

Trial Examiner Norwood: This is just the same question that comes up in almost every case of this kind.

2823 I will receive this with the conditions that those characterizations not be accepted as evidence or considered in any way.

Mr. Ewing: They are not offered as such.

Trial Examiner Norwood: And also with another condition that no information be considered in the exhibit the basis of which does no appear somewhere in the evidence; that no information like that will be considered.

Mr. Wright: There is a further objection to this. I want to direct your attention to the fact that Commission's Exhibit 659 is dated September 10, 1924. Commission's Exhibit 580 was something which I believe was supplied sometime in the late '40's. There has been testimony that it was used, I believe since sometime in the mid-Thirties. Now, here is an exhibit which attempts by its heading and characterization to close the gap of 10 or more years.

Mr. Ewing: You forget, Mr. Wright, that Commission's Exhibit 659-C to -P, inclusive, runs down to 1930, as shown on it.

Mr. DuBose: It shows modifications.

Mr. Ewing: It shows modifications. As far as statements, characterizations or whatever you call them, we are not offering them to prove anything. All we are offering is a tabulation which shows the facts and figures that are already in with respect to this particular subject.

Mr. Wright: There is not one of these documents

2824 which has any date later than 1921 on it except for certain penciled notes.

Mr. Ewing: There is '21 (indicating); there is '21 (indicating); '21; '20—

Mr. Wright: '21; '20; '21; '21. There is no document on there dated later than 1921.

Mr. Ewing: I am not trying to bridge any gap. I am not saying that—

Mr. Wright: This heading here can be cited in briefs from now on out as showing that—

Mr. Ewing: I assure you—I have already stated three times at least that I attach no significance to the heading whatever. I don't know how I could make it any plainer.

Trial Examiner Norwood: Now, I think that—

Mr. Wright: Under that circumstance—

Trial Examiner Norwood: All that I require is that the material on which that is based is all in the evidence.

Mr. Ewing: That is correct.

Mr. Wright: In view of counsel's last statement, I have no objection to the reception of it in evidence.

Trial Examiner Norwood: Received as marked.

Mr. Wright: Subject, of course, to my further check as to accuracy, which I have had no opportunity to do.

2825 Trial Examiner Norwood: Yes.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 148-A through 148-C, were received in evidence.)

Mr. Ewing: I will ask that these two sheets be marked Respondents' Exhibit 149-A and -B for identification.

(The sheets referred to were marked Respondents' Exhibit 149-A through 149-B for identification.)

By Mr. Ewing:

Q. I show you two sheets which have been marked Respondents' Exhibit 149-A and -B for identification and ask you whether you prepared those sheets?

A. Yes, sir.

Q. I show you a copy of Commission's Exhibit 749 and ask you whether the selected cities shown on Respondents' Exhibit 149-A and -B for identification, which you have testified you have prepared, are the same as those shown on Commission's Exhibit 749.

A. Yes, sir.

Q. Now, on Respondents' Exhibit 149-A and -B for identification, I call your attention to the column of figures headed "Differential per cwt." under which there appears in quotes "Old System" and ask you to state from what source you obtained the figures in that column.

A. From this other exhibit over there.

2826 Q. Referring to Commission's Exhibit 659-C to -P, inclusive?

A. Yes, sir.

Q. I also call your attention to the fact that on Respondent's Exhibit 149-A to -B, for identification, you have a column headed "Differential per cwt." and underneath it the words quoted "Zone System", and ask you to state the source from which you obtained those figures?

A. From our—this—Commission's Exhibit 580—

Q. 659.

A. The cities located in the zones indicated on Commission's Exhibit 580.

Q. Now, I call your attention to the fact that in Respondents' Exhibit 149-A and -B for identification, in the column headed "Differential per cwt."—"Old System"—the word "par" sometimes appears. Will you state what meaning attaches to that description?

A. There is no freight differential charged.

Q. Now, I call your attention to the last column headed "Differential per hundredweight"—"Zone System", in which the word "par" appears and ask you what meaning attaches to that description in that column?

A. No freight differential charged.

Q. Is it correct to say with reference to Commission's Exhibit 580 that the cities in the exhibit, Respondents' Exhibit 149-A and -B, opposite which the word "par" appears, in either differential column, were located 2827 in the purely white territory?

A. That is right, yes, sir.

Mr. Ewing: May I have that question read back.

Trial Examiner Norwood: Read it.

(The reporter read the record as follows:

"Question: Is it correct to say with reference to Commission's Exhibit 580 that the cities in the exhibit, Respondents' Exhibit 149-A and -B, opposite which the word "par" appears, in either differential column"—)

Mr. Ewing: I should have said "in the last differential column."

Trial Examiner Norwood: Correct that.

Answer the question.

The Witness: Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 149-A and -B in evidence.

Trial Examiner Norwood: Objection?

Mr. Ewing: And again I state that any material appearing on it by way of description, characterization, or otherwise is not offered for any purpose whatever as proof in this case of anything.

Mr. Wright: Mr. Tibbets, I call your attention on 149-B to the average differential per hundredweight, 37 cities, and so forth. How did you arrive at those 2828 figures that appear?

The Witness: By arithmetical calculation.

Mr. Wright: They are simply averages, then? They aren't weighted to show how much was sold in any particular territory?

The Witness: No, sir.

Mr. Wright: So they would not show, then, would they, the actual average differential on sales of the company—being an arithmetical average?

The Witness: Based on these figures.

Mr. Wright: Now, I call your attention to the statement there, "Cities designated by asterisks are located in our Pacific Coast branch and since there is no record to show whether or not the old method was followed in that branch territory, no comparison was possible."

Will you explain that designation there?

The Witness: It is simply that I did not have any record on that—anything on the Pacific Coast branch, so I left is out.

Mr. Wright: You mean the National Lead Company has no records in its possession showing the—

The Witness: In that branch?

Mr. Wright: —practices of that territory?

The Witness: On the old method.

Mr. Wright: Did you make a determination of
2829 what records were available?

The Witness: Yes, sir.

Mr. Wright: Then you were looking for other documents to include in that comparison?

The Witness: Yes, sir.

Mr. Wright: Then it was not just a comparison of these two exhibits, 749 and 659?

The Witness: You will have to let me get these for you now. 659? Which one is that?

Mr. Dixon: The list on the table.

The Witness: I based on these two records, yes, sir.

Mr. Wright: What I am getting at is now, did you mean by that statement on 149-A that there was no record in this case of what the practices were on the Pacific Coast?

The Witness: No, we had no record of the procedure or the differential procedure, as what I call the old method. We have no record of that in the Pacific Coast branch.

Mr. Wright: Your Honor, I object to the offer of this in evidence with the final characterizations which appear at the end of it. Pursuant to counsel's statement of qualification as to the heading, I have no objection to the basic data which are listed here under the columns, but I do object to the material appearing on 149-B relating to a search
of records of the National Lead Company to
2830 determine what practices were on the Pacific Coast.

Mr. Ewing: I would like to ask one question that I think would clear that up.

Trial Examiner Norwood: Certainly.

By Mr. Ewing:

Q. In Commission's Exhibit 659-C to -P, inclusive, which was the basis from which you obtained, as I understand it, the figures given in the left-hand differential column, was there any information with respect to differentials obtaining in territory covered by the Pacific Coast branch?

A. No, sir.

Q. And, therefore, when you prepared this, based upon that exhibit, no Pacific Coast branch differential data were included, is that correct?

A. That is right.

Q. And your asterisk is simply to indicate why in giving the data you did not have any for those particular Pacific Coast so-called cities?

A. That is right.

Mr. Wright: Your Honor, I don't believe that entirely clears it up, because the witness stated that he meant by that, that he had examined the records of the National Lead Company to determine whether they had any records on the Pacific Coast. I am trying to get straight whether this exhibit is simply a comparison of two documents
2831 already in the record, or whether they are something else that is being brought in.

Mr. Ewing: I will ask the direct question:

By Mr. Ewing:

Q. Is the data which appears on Respondents' Exhibit 149-A and B, for identification, data derived wholly from Commission's Exhibit 580, the small amount, and Commission's Exhibit 659-C to P, inclusive?

A. Yes, sir.

Mr. Wright: I object to this evidence as not being proper since it is more properly briefing material which is cumulative in the record and serves no useful purpose. The basic data are here and already available. I see no point in receiving it in evidence.

Trial Examiner Norwood: The objection is overruled.

The exhibit is received subject to the understa ding and conditions respecting these others we have just received.

(The document heretofore marked as RESPONDENTS' EXHIBIT NO. 149-A and 149-B was received in evidence.)

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 150-A and B, for identification.

(The document referred to was marked for identification as Respondents' Exhibit 150-A and 150-B.)

By Mr. Ewing:

Q. Mr. Tibbets, in the regular course of your busi-
2832 ness and having no relation to this procedure, did you ever have occasion to study the sales by National Lead of white lead-in-oil from the standpoint of such sales as made by States and by branches?

A. Yes, sir.

Mr. Wright: I object, Your Honor. It is a very leading question. I think if the witness has made any study, counsel can bring out properly how he made it and how he kept those records.

Mr. Ewing: I asked him if he made a study.

Trial Examiner Norwood: He may ask—

Mr. Wright: In the regular course of business.

Mr. Ewing: I want to show it wasn't done for this case, it was done prior.

Trial Examiner Norwood: Objection overruled.

Answer the question.

The Witness: Yes, sir.

By Mr. Ewing:

Q. When did you have occasion to make such a study?

A. In 1943.

Q. Of what did your study consist?

A. Well, we used—we tried to establish potential markets in each case, and then we compared what we were doing in each State, that is, the sales in each State. We used Government figures on paintable surfaces, and
2833 I won't go into all details but ability to—purchasing power, and so forth. We got up a factor which compared with the—then we made a comparison of what sales we had in each State.

Q. Now, I show you these two sheets of paper which have been marked Respondents' Exhibit 150-A and B, for identification, and ask you whether you compiled the data shown thereon?

A. Yes, sir.

Q. Was the data shown on those sheets compiled in connection with the study which you have described?

A. Yes, sir.

Q. Based upon that study, have you at my request made a compilation showing sales by National Lead Company of white lead-in-oil by branches and by States, setting forth the percentage of total white lead-in-oil business done in each State and by each branch, exclusive of the Pacific Coast branch or San Francisco branch and the States served by it?

A. Yes, sir.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 151-A and B, for identification.

(The document referred to was marked for identification as Respondents' Exhibit No. 151-A and 151-B.)

By Mr. Ewing:

Q. Now I show you these two sheets that have been marked Respondents' Exhibit 151-A and B, for identification, and ask you to tell us what they are.

2834 A. That was the percentage of sales by States and branches, excluding the Pacific Coast branch.

Q. Sales of what?

A. Sales of white lead-in-oil.

Q. In what year?

A. In 1942.

Trial Examiner Norwood: By whom was that?

The Witness: I got this—what do you mean?

Trial Examiner Norwood: By National?

The Witness: By National Lead Company, I beg your pardon.

By Mr. Ewing:

Q. And this is the data that you stated a few moments ago you compiled at my request?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 151-A and B in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: Just a moment.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Mr. Tibbets, is 151 a derivation of the study which is represented by 150?

The Witness: It is the same.

2835 Mr. Wright: It is the same?

The Witness: Yes, sir.

Mr. Wright: They are identical documents?

The Witness: Yes, sir. Well, let me see it just a minute. I have forgotten.

No, this is tonnage figures and these are percentage figures.

Mr. Wright: Are they percentage based on tonnage or percentage based on dollar value of sales?

The Witness: Based on tonnage.

Mr. Wright: Who made the calculations at each of the branches?

The Witness: The branches—you mean the giving of the tonnage report?

Mr. Wright: Giving the percentages in for each one.

The Witness: The percentages, I made that myself.

Mr. Wright: From data furnished you by the various branches?

The Witness: That is right.

Mr. Wright: How did they furnish that data?

The Witness: At my request.

Mr. Wright: I mean in what form did they furnish it?

The Witness: They sent it to me in tonnage figures for each State they operated in.

2836 Mr. Wright: Tonnage figures for each State?

The Witness: Yes, sir; taken from the sales figures.

Mr. Wright: You mean arithmetical computation, turning those into percentages?

The Witness: That is right.

Mr. Wright: You didn't calculate the sales? Each State furnished that to you?

The Witness: They furnished to me at my request.

Mr. Wright: Is that a customary practice with the National Lead Company to make such studies of its sales in the various States?

The Witness: Well, it was part of this survey, yes. We keep it by States; yes, sir.

Mr. Wright: Was such a study made on the Pacific Coast?

The Witness: No. We didn't make this study on the Pacific Coast.

Mr. Wright: Why did you omit the Pacific Coast?

The Witness: Well, because they handle—have a mixed paint line out there and it is thrown in; it doesn't make a clear picture that we wanted to get west—east of the Pacific Coast branch.

Mr. Wright: Does this include any keg products outside of white lead-in-oil?

The Witness: Not those figures; no, sir.

2837 Mr. Wright: It doesn't include any red lead-in-oil?

The Witness: No, sir.

Mr. Wright: Or any other paint products?

The Witness: Just paste lead—white lead-in-oil; paste white lead

Mr. Wright: Do you have the basic data available from which these figures were compiled?

The Witness: You mean the letters of this? No, I didn't keep that. After I had made this transcript, I didn't need it.

Mr. Ewing: Referring to Respondents' Exhibit 150-A and B, for identification.

The Witness: You mean 150, don't you?

Mr. Wright: No, sir. All I have before me is 151.

The Witness: I thought you were asking about the white lead tonnage figures from the branches. I did not keep those letters.

Mr. Wright: Do you have the request which you made of the branch managers showing how they were to get the figures?

The Witness: No, sir. It is simple enough. I simply asked for their sales in each State, of their white lead-in-oil sales by tonnage.

Mr. Wright: They reported the tonnage back?

The Witness: Yes, sir.

2838 Mr. Wright: Do you know whether the letters and correspondence relating to this are still preserved in your files; could be produced?

The Witness: I wouldn't know that—not in my files.

Mr. Wright: Would they be in the files of the company?

The Witness: I wouldn't know that. That would be a branch file, and I wouldn't know whether they kept them or not.

Mr. Wright: I am talking about the correspondence he received back.

The Witness: That is what I say. I have nothing in my files on the original letters reporting this.

Mr. Wright: Is it possible to determine whether those records are in the files of the National Lead Company?

The Witness: Well, I looked for them; I couldn't find them.

Mr. Wright: You did look for them?
The Witness: Yes, sir.
Mr. Wright: How are these files kept?
Mr. Ewing: Now I am going to object, Your Honor. I think this has gone far enough as far as identification is concerned.
Trial Examiner Norwood: I think he has been inquiring as to that supporting data only.
Mr. Wright: How in the world am I going to
2839 perfect an objection unless I have an opportunity to examine the witness.
Mr. Ewing: He has testified that 151-A and B was prepared by him in connection with this study and he has testified as to how he got the underlying data, and he says he has not the records from which he compiled them.
Mr. Wright: He said the underlying data was reported—
Mr. Ewing: —by the branches, and that he hasn't got it.
Trial Examiner Norwood: I think he may inquire about that; anything that goes to the reliability of that underlying data there.
Go ahead.
Mr. Wright: How is correspondence customarily filed in the organization?
The Witness: In my office?
Mr. Wright: Yes.
The Witness: By my secretary.
Mr. Wright: You keep personal files; you don't turn them over to some central filing branch?
The Witness: No, sir. We have our own files, each office.
Mr. Wright: How often do you destroy your files?
The Witness: Well, that depends on the type of information it is. Some things are kept for a good
2840 many years; other things are destroyed when we consider they will be of no value to us.
Mr. Wright: How extensive was your search for it?
The Witness: We looked all through my files and had my secretary to look through them.
Mr. Wright: Had you ever made similar inquiries of this sort before?
The Witness: No, sir.
Mr. Wright: In 1942?

The Witness: This is the first study I made on that basis.

Mr. Wright: Have you ever made any inquiry since that time?

The Witness: No, sir; we got into the—you see, this was '42, and we got into abnormal conditions in the war and didn't see the necessity of making those studies.

Mr. Wright: Was 1942 a normal year?

The Witness: It turned out to be, fairly normal.

Mr. Wright: Do you know whether the copies of that correspondence and of your correspondence with the branch offices would be preserved in the branch offices?

The Witness: I wouldn't know that.

Mr. Wright: Your Honor, I object to the offer of this material in evidence. It is clearly hearsay and by the witness' own testimony it is not a record kept in the
2841 regular course of business or a regular entry made.

It was a special study and the basic data from which it was derived may be in the possession of the National Lead Company as far as this witness knows. Certainly the search for the basic data that he has described is not sufficient to determine that there is any possibility of procuring it.

Mr. Ewing: He has testified that he made this study in the regular course of business as part of his job with the National Lead Company and under the circumstances I submit that, regardless of what weight there may be eventually given it, it is admissible.

Mr. Wright: Your Honor, in answer—

Trial Examiner Norwood: I think counsel should show the reliability of this; sufficient reliability to have it come in.

Mr. Ewing: I will withdraw for the moment my offer of 151-A and B.

Trial Examiner Norwood: If it is subject to counsel's undertaking—

Mr. Ewing: I withdraw for the time being the offer of 151-A and B, and I will ask that the witness look at 150-A and B.

By Mr. Ewing:

Q. Tell us what information is shown thereon.

A. White lead-in-oil and white lead in liquid form
2842 or paint, by States and branches.

Q. Was that compiled by you?

A. Yes, sir.
Q. For what year?
A. It covered 19—sales of 1942.
Q. And when you say "sales," what company's sales?
A. National Lead Company's sales.
Q. Did it include sales in the Pacific Coast branch territory?
A. No, sir.
Q. Based upon what did you prepare that?
A. By reports from the branches.
Q. And those reports that you testified about in response to Mr. Wright's questions?
A. Yes, sir.
Q. And that is your own original record?
A. Yes, sir.
Mr. Ewing: I offer it in evidence.
Mr. Wright: Your Honor, 150—that is 150 apparently; I have not seen it—apparently, from the testimony of the witness, is the same information expressed in a different way. One is tonnage and one is percentagewise but still the basic data about which he was testifying I believe were the basic data from which he prepared 150. 151 is a further refinement of 150; but it was not something, an 2843 entry made in the due course of business.
Mr. Ewing: It was made in the regular course of business. The fact that it wasn't ever done before doesn't mean that it wasn't done in the usual course of business.
Mr. Wright: I appreciate that counsel asked the witness if it was made in the regular course of business, and that the witness answered "yes," but on voir dire it appeared that it was something which they made up in 1942, had never made before and never made since.
Mr. Ewing: He made it up as part of his job.
Mr. Wright: There has been no showing that the basic data can't be brought in for some sort of examination.
Trial Examiner Norwood: Do you have these tabulations made up on invoices, or something which the other side can verify? You usually have?
If Commission's counsel has something or other to verify any portion of the data here—
Mr. Ewing: The document in your hands, Judge, was prepared by the witness.
Trial Examiner Norwood: But he prepared it on reports by somebody else.

Mr. Ewing: I say that was prepared by the witness for the purpose of offering it here. The document which Mr. Wright has just given you was prepared by the witness, himself, from data available to him at that time which
2844 he no longer has, but he prepared it, himself, in the regular course of his job.

Trial Examiner Norwood: The condition we have always put on documents of this kind is that the supporting data be available to the other side. It doesn't have to be offered in evidence but there has to be some record, or something, from which the Commission can verify the figures.

Mr. Wright: According to the witness' testimony, it is perfectly possible that copies of these letters which were the basis of that are still in the files of the branch offices.

Trial Examiner Norwood: If the counsel will undertake to support that, I can receive them and then go on to make the examination, but it is subject to that condition.

Mr. Ewing: Well, we will make an attempt to.

Trial Examiner Norwood: You have to undertake to make the supporting data available to the other side.

Mr. Ewing: If I don't, I take it Your Honor will exclude the document or strike it at a later date?

Trial Examiner Norwood: We are going to take evidence based on that which you are not fairly certain you can furnish supporting data here for. I don't see how we can take it in.

Mr. Ewing: May I go off the record for a moment?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:12 p. m., a recess was taken until 2 p. m. of the same day.)

2845 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order. Proceed.

ALBERT B. TIBBETS resumed the stand and testified further as follows:

Direct Examination (Continued).

Mr. Ewing: In connection with my offer of Respondents' Exhibit 150-A and -B for identification, I would like to state that I believe that we will be able to produce the source material which forms the basis for it, or the equivalent, and with that statement I renew the offer.

Mr. Wright: Well, Your Honor, purely as a matter of procedure, I don't believe the material should be received until we have further background.

Trial Examiner Norwood: On condition that that be furnished, I believe it might be received; and if there is some legitimate examination you want to make on it, throwing light on its authenticity and so on—

Mr. Wright: (Interposing.) I have no objection to its receipt on that condition, provided the witness is to be examined further regarding the material; but if he isn't—

Trial Examiner Norwood: (Interposing.) You offer Respondents' Exhibit 150-A and 150-B?

2846 Mr. Ewing: Yes, and Respondents' Exhibit 151-A and -B.

Mr. Wright: That is provided, of course, I am given an opportunity, when the basic material is furnished, of having this witness here for further examination?

Trial Examiner Norwood: Yes, that is right. They are received, subject to the condition that the basic material is to be made available to counsel in support of the allegations of the complaint, and that thereafter he is to have the opportunity to cross-examine the witness further.

Mr. Wright: That is agreeable.

(The papers referred to, heretobefore marked for identification RESPONDENTS' EXHIBITS 150-A and 150-B, and 151-A and 151-B, were received in evidence.)

Mr. Ewing: I ask that this map be marked Respondents' Exhibit 152 for identification.

Trial Examiner Norwood: It may be so marked.

(The map referred to was marked Respondents' Exhibit 152 for identification.)

By Mr. Ewing:

Q. Mr. Tibbets, I show you this map, which has just been marked Respondents' Exhibit 152 for identification, and ask you to state if you know what the various figures, other than the legends such as ¼ cent, ½ cent, and so forth, that appear on the exhibit, are?

2847 A. These are the percentage of the sales of white lead-in-oil by States, excluding the Pacific Coast branch.

Q. Have you compared percentages, by States, of National Lead Company's white lead-in-oil business as set forth in your compilation Respondents' Exhibit 151-A and -B, which I show you, with the percentage figures, by States, shown on Respondents' Exhibit 152 for identification?

A. Yes, sir.

Q. Will you state whether they are the same?

A. Yes, sir.

Q. Meaning they are?

A. They are.

Q. Now directing your attention again to Respondents' Exhibit 151-A and -B, will you state whether, under National's method of selling white lead-in-oil, one or more branches may serve the same State?

A. That is true.

Q. Still directing your attention to Respondents' Exhibit 151-A and -B, will you tell us whether Alabama is served by National's Cincinnati branch?

A. Yes, sir.

Q. Is it served by any other branch?

A. St. Louis.

Q. Now I ask you to look at the map, Respondents' Exhibit 152 for identification, and in particular at

2848 Alabama, and ask you whether you have compared the percentage of business done in Alabama with the total of the St. Louis and Cincinnati branch business in Alabama, as shown by Respondents' Exhibit 151-A and -B?

A. Yes, sir.

Q. How does the total compare?

A. It is the same.

Q. That is, the percentage of business shown by the map as Alabama business, corresponds with the compilation in Exhibit 151-A and -B for the Cincinnati branch and the St. Louis branch business in Alabama?

A. Yes, sir.

Q. Where one or more branches serve a particular State, what does the percentage of business figure, shown by the map, Respondents' Exhibit 152 for identification, reflect?

A. The total white lead-in-oil,—the percentage of the total white lead-in-oil business of that State, of all States except the Pacific Coast branch.

Mr. Ewing: I offer Respondents' Exhibit 152 for identification.

Mr. Wright: Objection. It hasn't been identified as to who prepared it or the source of it.

Mr. Ewing: I will withdraw the offer. I forgot that, Mr. Wright.

Trial Examiner Norwood: All right.

2849 By Mr. Ewing:

Q. I ask you to compare Respondents' Exhibit 152 for identification with copy of Commission's Exhibit 5-A.

A. It is the same.

Q. As far as the territorial divisions indicated by the coloring matter are concerned?

A. Yes, sir, the different zones.

Q. I ask you to look at Respondents' Exhibit 151-A and -B, and Respondents' Exhibit 152 for identification, and compare the State totals of white lead-in-oil percentage business with the State totals indicated by your Exhibit 151-A and -B.

A. They are the same.

Mr. Ewing: I now offer the map, Respondents' Exhibit 152, for identification, and I might say that it is simply a pictorial representation of the data set forth in the other exhibit, Respondents' Exhibit 151-A and -B.

Mr. Wright: I still object. There has been no statement as to who prepared it and the method by which he prepared it.

Mr. DuBose: What difference does it make?

Mr. Ewing: It is a picture map of the States, with figures written in which compare with the other exhibit.

Mr. Wright: His testimony that he sees, by comparing this document and this document, that they have certain common features, doesn't make the document admissible.

2850 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have a few questions on voir dire.

By Mr. Wright:

Q. Would you explain again how you derived the figure of .38 for the State of Alabama?

A. That is the sum of the percentage sold in that State by Cincinnati and St. Louis.

Q. How did you derive that sum, simply by adding the figure appearing under St. Louis for Alabama to the figure appearing under Cincinnati for Alabama?

A. That is right.

Q. And in any case where there was a duplication, it was derived in the same manner?

A. Yes, sir.

Mr. Wright: I make the same objection, Your Honor, to Respondents' Exhibit 152 as was made to Respondents' Exhibit 150-A and -B, and 151-A and -B, namely, that the basic data are not available for cross-examination.

Trial Examiner Norwood: I shall overrule the objection and receive Respondents' Exhibit 152 for identification, subject to the same conditions, that is, that the basic data for 150-A and -B and 151-A and -B, on which this map was based, be made available to counsel in support

2851 of the complaint, and if it is not made available I will entertain a motion to strike all this evidence.

(This map referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 152, was received in evidence.)

Mr. Ewing: I ask that this document be marked Respondents' Exhibit 153 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Respondents' Exhibit 153 for identification.)

By Mr. Ewing:

Q. I show you this paper, Mr. Tibbets, that has just been marked Respondents' Exhibit 153 for identification,

and ask you whether that was prepared by you or under your direction, at my request?

A. It was prepared under my direction.

Q. From what source, if you know, were the figures derived?

A. From the books of the Accounting Department.

Q. Have you those figures with you?

A. No, sir.

Q. Will we be able to produce them in New York?

A. Yes, sir, I think so.

Q. Will you look at the branches listed on Respondents' Exhibit 153 for identification, and state which of National's ten branches there listed now produce white lead-in-oil?

A. Atlantic, Chicago, John T. Lewis, and St. Louis 2852 and San Francisco.

Trial Examiner Norwood: Those points manufacture it?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Did National ever produce white lead-in-oil at any of the other branches shown on that exhibit at which there now is no production?

A. Yes, sir.

Q. Will you tell us at which branches it produced white lead-in-oil, if you know?

A. Boston, Buffalo, Cincinnati, Cleveland, Pittsburgh.

Q. I don't recall your answer to a preceding question, but will you tell us whether you included Chicago as a branch at which white lead-in-oil is now produced?

A. I thought I included it. It should have been.

Q. I couldn't recall.

Mr. Ewing: Subject to supplying the information in a fashion similar to the prior ruling, I offer Respondents' Exhibit 153 for identification in evidence.

Mr. Wright: Well, I have the same objection, of course.

Trial Examiner Norwood: Yes. Now that is subject to your producing the—

Mr. Ewing: The basic data from which it was compiled.

2853 Trial Examiner Norwood: When we get to New York?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Received, under that condition.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 153, was received in evidence.)

Mr. Ewing: I now ask that these 9 sheets be marked Respondents' Exhibit 154-A to -I, inclusive, for identification.

Trial Examiner Norwood: They may be so marked.

(The papers referred to were marked Respondents' Exhibit 154-A through 154-I for identification.)

By Mr. Ewing:

Q. I show you these nine sheets marked Respondents' Exhibit 154-A to -I, inclusive, for identification, and ask you to state whether the information set forth therein was compiled and tabulated by you or under your direction?

A. I did it.

Q. Does this exhibit set forth pig lead prices from the earliest date stated thereon, namely, December 20, 1920, down through January 14, 1942?

A. Yes, sir.

Q. What pig lead prices does it purport to show?

A. New York prices.

Q. New York prices?

A. Yes, sir.

2854 Q. From what source did you obtain the prices set forth in this exhibit?

A. From the Sales Department.

Q. Now will you tell us what other prices this exhibit purports to show for what other pigments?

A. Paste White Lead, Paste Red Lead, Dry White Lead, Lead Sulphate, Dry Red Lead, and Litharge.

Q. When you say "Paste White Lead"—

A. (Interposing.) White lead-in-oil.

Q. And when you say "Paste Red Lead"—

A. (Interposing.) Red lead-in-oil.

Q. When you stated that you obtained the pig lead price figures from the Sales Department and referred to them before that as the New York prices, what company's prices were they, if you know?

A. I don't believe I am prepared to tell that.

Q. I will ask you this question. Were they National's prices?

A. No.

Q. Now with respect to the other pigments which you have mentioned, namely, Paste White Lead, Paste Red Lead, Dry White Lead, Lead Sulphate, Dry Red Lead, and Litharge, what company's prices are shown in this exhibit?

A. National Lead Company's.

Q. Now what prices of National's with respect to
2855 those 6 pigments that I have just mentioned, were shown on the exhibit?

A. Paste White Lead, Paste Red Lead, Dry White Lead, Dry Red Lead, and Litharge—

Q. (Interposing.) I mean what was the price that you show here?

A. Per hundred. You mean from the standpoint of retail price?

Q. Yes.

A. That is list price.

Q. That is sometimes referred to in this case as "card price", is that right?

A. Right, card price.

Q. What price changes are shown with respect to those pigments?

A. I don't quite understand your question.

Q. I will withdraw the question.

Does this exhibit, to the best of your knowledge and information, set forth all card prices for these 6 pigments, other than pig lead prices, and changes in National's prices, for the period covered by the list?

A. Yes, sir.

Q. Calling your attention to page 5 of the exhibit which has been marked Respondents' Exhibit 154-E for identification, I ask you to note in the two columns to the right,
under the respective headings Dry Red Lead and
2856 Litharge, the pencil entries which appear, and I ask you who made those entries?

A. I did.

Q. What do they represent?

A. They represent the Dry Red Lead price at that date, April 4, 1930, and the Litharge price for the same date—pardon me, it is April 7, 1930.

Q. Under what circumstances were those entries made?

A. I made the correction in checking back on this, and my secretary didn't see it and I didn't see it.

Q. Now I call your attention to page 9 of the exhibit, marked Respondents' Exhibit 154-I for identification, and direct your attention to the last figures in the column headed Dry Red Lead and Litharge. Whose entries are those two pencil entries?

A. Those are mine.

Q. What do they represent?

A. They represent the price change on January 14, 1942, for dry red lead and litharge.

Trial Examiner Norwood: Are those figures $10 for Dry Red Lead and $9 for Litharge, respectively?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Under what circumstances were those entries made by you?

A. I made them, and my secretary didn't catch them, and neither did I.

2857 Q. Do you mean by that answer that when the document was typed, they were not on there, and that upon checking you discovered their absence and supplied them?

A. That is right, sir.

Mr. Ewing: I offer Respondents' Exhibit 154-A to -i, for identification, in evidence.

2858 Mr. Wright: I would like a short cross-examination on the identification.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Did I understand you to say that you compiled this document?

A. Yes, sir.

Q. When did you compile it?

A. About a month ago, I guess.

Q. Will you tell us now just how you went about compiling it; what did you do to get the information?

A. Well, I had the records of the pig lead changes—

Q. Where did you obtain those?

A. From the Sales Department.

Q. Do you know where they obtained them from?

A. Yes, they compiled them. As every change is made they make a record of every pig lead change.

Q. When did they make that record?

A. In 1920—or even back of 1920, I have forgotten just

what year it was, but it is from 1920 right straight through.

Q. Do you know what prices of pig lead that represents?

A. Yes, the New York prices.

Q. Is that common pig lead?

A. Yes.

Q. Or corroding lead?

2859 A. Yes.

Q. Which?

A. Corroding lead.

Q. It is corroding lead?

A. That is my understanding of it.

Q. And where did you get that understanding?

A. Well, that is what these pig lead changes are, for corroding lead.

Q. You are willing to stand on it, then, that these are figures for corroding lead rather than common pig lead that appear here? You know that there is a differential, do you not, between common and corroding?

A. Yes. I will have to change my answer; I don't know which these are.

Q. Do you know from what sources the Sales Department compiled that?

A. From the prices established in New York.

Q. Established by whom?

A. By the selling companies, the supplying companies.

Q. You don't know who those companies might have been?

A. No.

Q. Or how they received that information?

A. No; it is the New York market.

Q. On the paste white lead, that is the list price, you said the price a consumer would pay to one of your dealers?

2860 A. That is the list price.

Q. That is not the painters' price?

A. No.

Q. For what quantity is that price?

A. 100 pounds.

Q. That is in 100 pound kegs?

A. Yes, sir.

Q. That would be for a single keg or more than a single keg?

A. Well, it is a single keg price.
Q. There is no quantity discount on that?
A. No, sir.
Q. That is gross?
A. Yes, sir.
Q. Now as to the paste red lead, is that in the same category?
A. Yes, sir.
Q. As to the dry white lead, what sort of a container is that in?
A. That would be a keg price.
Q. Of 100 pounds?
A. Yes, sir.
Q. That would be the type of product which would be sold in accordance with those zones in Commission's Exhibit 580, on dry white lead?
A. Yes.
Q. How about lead sulphate; are the prices that 2861 are entered there in the same category?
A. That is a hundred pounds.
Q. One Hundred pound kegs?
A. Yes.
Q. And dry red lead and litharge, would those be 100 pound keg prices on those products?
A. Yes.
Q. Sold in accordance with the zones similar to those in Commission's Exhibit 580?
A. That is right.
Q. This wouldn't be the dry lead, dry red lead and litharge sold to paint manufacturers or battery manufacturers?
A. No, sir.
Q. This is the type sold to dealers for resale generally?
A. Not lead sulphate, we don't sell that through dealers.
Q. In what territory are these prices applicable?
A. New York.
Q. Would that be the par territory?
A. Yes.
Q. This would not reflect any changes that were made in discounts to dealers or other purchasers, would it?
A. No, sir.
Q. Only the list price changes?
A. Right.

Q. How did you get these price changes, Mr.
2862 Tibbets; just what procedure did you go through to obtain them?

A. The paste white lead was from actual cards, price cards.

Q. Did you have a complete set of those cards in your possession?

A. Yes, sir.

Q. How about the other products?

A. They changed so often that those were records kept by the Sales Department; they don't keep the cards for all of those things.

Q. How did they keep their records on that?

A. By just a tabulation of the changes as they made them.

Q. In what form were these tabulations?

A. In typewritten form on small sheets.

Q. They had a running tabulation of all the price changes?

A. That is right.

Q. Can you produce the cards and the tabulations and the basic data from the Sales Department, from which this was prepared?

A. Yes, sir.

Q. Would they be in a position to tell us exactly what those pig lead prices were, for what grade of lead, and how they were made, and from what source they got them?

A. No.

Q. They wouldn't know from what source those figures were compiled?

2863 Mr. DuBose: Who wouldn't know?

Mr. Ewing: I don't think he understood the question.

Mr. DuBose: I object to the question.

Mr. Wright: I will repeat it.

By Mr. Wright:

Q. Would the Sales Department know the source of these pig lead prices which they furnished to you, which appear in the first column of this exhibit?

A. I wouldn't know that.

Mr. Wright: Your Honor, I object to the receipt of this document in evidence without proffer, for examina-

tion at least, of the basic data upon which it was made. In the first place, as to the pig lead prices it is obvious that this witness doesn't even know what grade of lead is involved, let alone from what source the Sales Department obtained the information.

Mr. Ewing: We will supply the pig lead data, and with respect to the other price changes we have, I believe, all of the basic data here.

Mr. Wright: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: While I had not intended to offer the price cards showing changes in the case of pig lead, and
2864 the tabulations showing changes in the other pigment prices in view of the large number of them, I am prepared now to make the proffer of them to Mr. Wright for his examination in connection with any cross-examination he has of this witness. I can, of course, through this witness offer each and every one of the documents which support the compilation in case of the six pigments other than pig lead, but I didn't think it was necessary to burden the record with that unless you would like to have it in.

Trial Examiner Norwood: Suppose counsel confer about that and see if they can make some agreement on it.

Mr. Wright: I would like to go off the record for this discussion.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will take a ten minute recess.

(A short recess was taken.)

Trial Examiner Norwood: All right, proceed.

Mr. Ewing: I withdraw the offer of Respondents' Exhibit 154-A to i for Identification at this time.

I ask that this sheet be marked Respondents' Exhibit 155 for identification.

Trial Examiner Norwood: It may be so marked.

(The paper referred to was marked Respondents'
2865 Exhibit No. 155 for identification.)

By Mr. Ewing:

Q. I show you this sheet of paper which has been marked Respondents' Exhibit 155 for Identification, and ask whether it was prepared by you?

A. Yes, sir.

Q. What does it purport to show?

A. The average percentages of white lead-in-oil sales sold by branches through agents.

Q. For what years?

A. The years 1933 to 1941, inclusive.

Q. From what source did you obtain those figures?

A. From the branches.

Mr. Ewing: I would like to go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Does this refer to consignment sales?

Mr. Ewing: Yes, sir.

Mr. DuBose: Under the agency contracts which are already in evidence.

Trial Examiner Norwood: What does that mean—the average percentage as compared to the total sales of National?

Mr. Ewing: Of each branch, of white lead-in-oil.

2866 Mr. DuBose: Other than the Pacific Coast.

Trial Examiner Norwood: That is, white lead-in-oil was 86 per cent of the sales of the Atlantic Branch?

Mr. Ewing: Eighty-six per cent of the Atlantic Branch sales of white lead-in-oil during this time were sales made through the consignment method.

Mr. Wright: May I ask a few questions on voir dire?

Trial Examiner Norwood: Yes.

By Mr. Wright:

Q. Mr. Tibbets, where did you get the information that appears in the note appearing at the bottom of the page?

A. From the branches.

Q. Is this the correspondence from the branches which I have here?

A. Yes, sir.

Q. Will you point out where in that correspondence you got that information?

A. That is my own compilation based on these. I wouldn't say that was—

Mr. Ewing: (Interposing.) I might say this. When I come to offering this exhibit I will omit from the offer, and we can physically strike it should it seem preferable, the two sentences appended, as well as the note below them.

Trial Examiner Norwood: Very well. Off the record.

(Discussion off the record.)

2867 Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Is this document which I hand you here, dated March 26, 1947, the letter which you sent to the branches?

A. Yes sir.

Q. And on the basis of which you received this information?

A. Yes, sir.

Mr. Wright: I have no further voir dire.

Mr. Ewing: I offer Respondents' Exhibit 155 for identification in evidence, except for the matter which appears below the word "St. Louis" and the figure "90".

Mr. Wright: Your Honor, I object to the offer and I direct your attention to the document which the witness has just stated was the one that he sent to the branch managers asking for this information, in which he requested them for an estimate. Now you will notice that the original exhibit doesn't state that it is an estimate. That is the vice of receiving a tabulation such as this sort separate and apart from the basic materials. This would appear to be, from the exhibit itself, a tabulation which was made from the physical records of the company. In fact, all that the witness asked the branch managers for was a guess. The substance of this is a tabulation of guesses, it can't be anything else. It is stated in the replies, many of them, that this is frankly an estimate because they don't know.

2868 Trial Examiner Norwood: I think we will have to wait to receive this until we get a firmer foundation for it.

Mr. Wright: The people who made those estimates and guesses haven't been proffered. How do I know on what basis they made their guess? And the note which is appended "An average of 1 to 2 per cent was sold through dealers other than agents and the balance was sold to customers such as government and industrials" was an

afterthought which this witness put on there, which he didn't get from any of the basic data.

Trial Examiner Norwood: I think that I will sustain the objection for the time being. Possibly you can put a little foundation under it later on and then maybe we will receive it.

Mr. Ewing: I have no further questions.

Trial Examiner Norwood: Cross examination.

Cross-Examination by Mr. Wright.

Q. Mr. Tibbets, you stated that the National Lead Company at one time manufactured white lead at Boston, Buffalo, Cincinnati, Pittsburgh and Cleveland, is that correct?

A. Yes sir.

Q. When was that?

A. I couldn't tell you the dates.

Q. Have they produced any white lead at any of those places since 1930?

2869 A. No.

Q. Since 1920?

A. I couldn't tell you; I haven't got the figures here at all.

Q. Have they produced it that you recall since you began your service with the company?

A. My memory wouldn't serve me as to that.

Q. But at any rate it is a long time ago, is it not?

A. Yes sir.

Q. What are these branches that appear in the exhibits here; what do you mean by the term "branch"?

A. That is a branch office, in branch territory.

Q. Is that a sales organization?

A. A sales organization and in some cases combined with manufacturing.

Q. In some cases?

A. Yes, I mentioned those.

Q. Now one manufacturing branch would manufacture for and ship into perhaps several branch territories?

A. That is right.

Q. So that actually the branch territories are simply a sales and bookkeeping proposition as distinguished from manufacturing, although some branches may also manufacture?

2870 A. That is right.

Q. What is the Oxide Committee of the National Lead Company?

A. Well—I don't understand your question.

Q. You stated, as I recall it, that you had been Secretary to the Oxide Committee since somewhere around 1924; that is that committee?

A. It is the Sales Committee on Oxides.

Q. It is a Sales Committee, is it?

A. Yes sir.

Q. Does that committee consider marketing problems and methods of price quotation?

A. Yes sir.

Q. Do they originate recommendations to the Company as to changes in those marketing policies?

A. No, not necessarily—that is in a general way.

Q. What do you mean "in a general way"?

A. Well, any major change in policy they might discuss it at a committee meeting, but they don't determine the policy on prices.

Q. Are you familiar with the manner in which the company quoted on these oxides over any considerable period of time?

A. No.

Q. Your duties on the Oxide Committee and on the Sales Committee didn't include any experience, then, with the pricing methods that the company employed?

2871 A. Well, only for attending the meetings and recording what was done.

Q. You didn't take any part in the policy determinations or discussions?

A. No sir.

Q. You were in the advertising end of the business, you stated?

A. Sales promotion.

Q. Have you had anything to do with the advertising?

A. I did at one time.

Q. When was that?

A. From 1919 to about 1927, I think it was.

Q. Do the fields of advertising and sales promotion more or less run together on a number of things?

A. No.

Q. They do not?

A. No.

Q. What were the principal media of advertising of

the company back in the period when you were in that department?

A. Magazines.

Q. What magazines, for instance?

A. Well, the Saturday Evening Post. I don't recall them all now, that was several years ago and I don't remember just what the media were at that time. That was back in 1927 when I left there. I had the direct mail 2872 anyway, I didn't have the medium selection.

Mr. Wright: May we have a five minute recess, Your Honor? I think we can probably get through with this witness in a hurry if we do.

Trial Examiner Norwood: A five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Tibbets, calling your attention again to Respondents' Exhibit 148, under the column "Differential Per Ctw. 'Old System'," do you know what that system was?

A. Yes, it was their differential points; we charged freight differentials.

Q. The figures are as you found them in Commission's Exhibit 659?

A. Yes sir.

Q. Do you know how long the company operated on that Old System?

A. No, I don't.

Q. Do you know when they changed to the Zone System as shown in Column 2?

A. Not definitely I don't.

Q. What is your recollection?

A. I prefer not to say rather than be inaccurate.

Q. Did you mean, in preparing this exhibit, to 2873 have it show that the differentials as shown in Commission's Exhibit 659 were changed to the differentials which are shown in Commission's Exhibit 580?

A. Yes sir.

Q. And that there were no intervening differentials between those that were different from those that appear here?

A. I followed the record.

Q. What do you mean by "I followed the record"?

A. Well, the exhibits that you have mentioned, the information you mentioned—I followed those.

Q. In other words, you don't know anything independent of what is in those exhibits?

A. No sir.

Q. You didn't mean this exhibit to show anything that was independent from what was in those two exhibits?

A. I followed those two exhibits.

Q. And there is nothing added from any other records or from your own knowledge at all?

A. No sir.

Q. Going back to Respondents' Exhibit 148, as I understood your testimony these figures in the Old System were added to the base price in making the price to the customer?

A. That is the freight differential, yes sir.

Q. How was that handled, do you know?

A. No, I wouldn't know that.

2874 Q. Did the customer pay the freight in those instances, do you know?

A. They paid the differential.

Q. They paid the differential over the par price?

A. Yes sir.

Q. Would the testimony which you have just given regarding those differentials as to Respondents' Exhibit 148 be the same in answer to the same questions regarding Respondents' Exhibit 149, as to the significance—

A. (Interposing): Yes, the difference in differentials.

Q. They are on the same basis, then?

A. Yes, they are.

Mr. Wright: I have no further cross examination, Your Honor.

Trial Examiner Norwood: Is there any redirect?

Mr. Ewing: No redirect.

Trial Examiner Norwood: Thank you, Mr. Tibbets.

(Witness excused.)

Mr. Ewing: I would suggest Your Honor that we adjourn now until tomorrow morning at 10 o'clock.

Trial Examiner Norwood: All right, we will recess until tomorrow morning at 10 o'clock, Eastern Daylight Saving Time.

(Whereupon, at 3:30 p.m., June 10, 1947, the hearing in the above-entitled matter was adjourned.)

2875 Room 332, Federal Trade Commission Building, Washington, D. C., Wednesday, June 11, 1947.

Met, pursuant to adjournment, at 10:00 a. m., E. D. S. T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and
Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Welch, Esq. (Davies, Richberg, Beebe, Busick & Richardson, 815-15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq. (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Henry E. Gardiner, Esq. (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2876 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 11th day of June, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearances.

Call your witness.

Mr. Ewing: I understood, Your Honor, you were going to rule this morning on Mr. Wright's motion to strike Mr. Sprague's testimony.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I have looked at the passages there, and will need some discussion before I can make any decision about them, so we will defer that until later today, or as soon as we can get to it.

Call your witness.

Mr. Ewing: Mr. McNair.

JOHN GORDON CRAWFORD McNAIR was thereupon called as a witness for the respondent National Lead 2877 Company, and having been first duly sworn, testified as follows:

Trial Examiner Norwood: State your full name.

The Witness: John Gordon Crawford McNair.

Direct Examination by Mr. Ewing.

Q. Mr. McNair, by whom are you presently employed?

A. National Lead Company.

Q. When were you first employed by National Lead Company?

A. October 5, 1910.

Q. By what branch were you first employed?

A. The Atlantic Branch, New York.

Q. By what branch are you presently employed?

A. Atlantic Branch, New York.

Q. What was the nature of your first employment in the Atlanti. Branch?

A. I was a clerk in the office.

Q. And how long did you occupy that position?

A. Six months.

Q. Thereafter, what positions did you occupy?

A. Salesman.

Q. Still with the Atlantic Branch?

A. Yes, sir.

Q. How long were you a salesman with the Atlantic Branch?

A. Approximately 8 years.

Q. What was the nature of your employment fol-
2878 lowing your employment as a salesman?

A. Assistant Sales Manager.

Q. Still with the Atlantic Branch?

A. Still with the Atlantic Branch.

Q. And how long were you Assistant Sales Manager?

A. Six years.

Q. What was your connection with the Atlantic Branch thereafter?

A. I became Sales Manager, which job I occupied for about five and a half years; Assistant Manager of the Atlantic Branch for a period of about nine years; and Manager of the Branch for about eight years.

Q. Now will you tell us generally about the set-up of the Atlantic Branch, what products it distributes or manufactures, if any?

A. We manufacture a variety of lead products. In the Pigment Division, white lead-in-oil, red lead, litharge, basic lead sulphate, red lead-in-oil, linseed oil, and a lot of other miscellaneous items.

Q. Where are your plants located?

A. Of the Atlantic Branch?

Q. Of the Atlantic Branch.

A. We have two plants in Brooklyn, and one in Perth Amboy.

Q. What is manufactured at the Perth Amboy Branch?

A. Metal products and white lead.

2879 Q. Will you tell us approximately the white lead capacity of the Perth Amboy plant?

A. At the present time?

Q. At the present time:

A. Approximately about 14,000 tons a year of white lead-in-oil and dry white lead.

Q. Now will you tell us what you manufacture at the two Brooklyn plants?

A. Well, at the Perth Amboy plant we finish the dry lead, and we transport pulp white lead from the Perth Amboy plant to Brooklyn, which plant processes it by the addition of linseed oil.

Q. When you say you finish the white lead at Perth Amboy, will you explain that?

A. The dry white lead.

Q. The dry white lead.

A. Well, it simply comes over in water pulp, and that is put in driers and dried, the water taken out of it and it is dried.

Q. Will you tell us what the pulp lead is that is shipped from Perth Amboy to Brooklyn?

A. Pulp lead is the carbonated lead in water form. The process which we use in that plant is a cylinder process, better known as the Carter process; and that is washed with water, and when it is finished, the wash-
2880 ing, it is shipped in tanks, that is, by tank-boat, to Brooklyn, at which point it is dewatered by the addition of linseed oil, and it runs through a series of roller mills and is put into the kegs as lead-in-oil.

Q. Now during the time that you have been connected with the Atlantic Branch, has that branch operated any white lead plants other than those you have mentioned?

A. Yes, sir.

Q. Will you tell us where they were located?

A. We operated the Matheson Lead Company in Long Island City; we had another plant in Port Richmond.

Q. Do you still operate the plant at Port Richmond?

A. No, sir.

Q. What happened to it?

A. We shut the plant up, and it was finally demolished, to save taxes. The reason why we did that was because the volume was insufficient to operate that plant and the Perth Amboy plant economically. As a matter of fact, to manufacture white lead economically it is desirable to have your plant operating at its fullest capacity, which couldn't have been the case if our production had been divided between Port Richmond and Perth Amboy.

Q. What was the capacity of the Port Richmond plant at the time you shut it down?

A. About 12,000 tons, in round figures.

Q. Now what has become of the Matheson plant?

2881 A. The Matheson plant was likewise shut down, and that has been sold; that is, the machinery was taken out of there and transferred, some to the Brooklyn plant and some down to Perth Amboy, and eventually the plant was closed up and sold.

Q. About when did you shut the Port Richmond plant, do you know?

A. I think it was in the late 30's, if I remember correctly.

Q. And about when did you shut the Matheson plant?
A. About '32 or '33, or somewhere in the early 30's.
Q. Will you tell us why you closed the Matheson plant?
A. We closed the Matheson plant for the same reason that we closed the Port Richmond plant, because it was not economical to operate that plant with the capacity we had going through it.
Q. And what was the capacity at the time you closed it?
A. Approximately 7,000 tons.
Q. You mean per year?
A. Per year.
Q. Am I correct in understanding that during the time that you have been Manager of the Atlantic Branch of the National Lead Company, you have had charge of all the activities of that branch, including manufacture, sales and distribution of its products?
A. That is correct.
Q. What connection, other than as Manager and
2882 Assistant Manager of the plant or of the branch, have you yourself had with the white lead-in-oil business of National Lead Company?
A. Well, I was a salesman and sold it for 8 years.
Q. And what was your territory, Mr. McNair?
A. South Carolina, Georgia and Florida; and I was moved up then to the New England States, and eventually into the New York area, around Brooklyn and Jersey, prior to the time I was transferred into the office.
Q. Now in the regular course of your employment as a salesman, what contact, if any, did you have with painters or other users of white lead-in-oil?
A. I had a great deal of contact, because in the nature of my sales job it was necessary for me to contact painters, builders, architects, stores, wholesale distributors, railroads, and every type of industry that would prove a likely prospect for the consumption of white lead.
Q. What raw materials are used in the production of white lead?
A. Pig lead and linseed oil.
Q. How is white lead produced?
A. White lead is produced by several methods, such as the old Dutch process, the Carter process, the electrolytic process, the Lenox process—that covers the general range of the normal processes.

Q. What process was used by the Atlantic Branch 2883 in its production of white lead?

A. We have manufactured by the Lenox process, by the Dutch process, and the Carter process.

Q. Where did you manufacture with the Dutch process?

A. Perth Amboy and Brooklyn.

Q. By what process do you now manufacture?

A. We manufacture by the Carter process.

Q. And that is at Perth Amboy?

A. Yes, sir.

Q. Do you know at what branch or plants National now produces white lead, in addition to the plants of the Atlantic Branch?

A. Yes, sir.

Q. Will you state them?

A. New York, Philadelphia, Chicago, St. Louis, and San Francisco.

Q. Did National ever produce white lead at any of its other branches?

A. Yes, sir.

Q. Will you tell us at which branches it formerly produced white lead, if you know?

A. Originally, all branches at one time had a white lead plant, and that is how the branches came into being. They had a Boston branch, they had a plant in Salem, Pittsburgh, they had a plant in Cincinnati, one at 2884 Cleveland—all of those plants have been discontinued.

Q. Did the Buffalo Branch have a plant?

A. Yes, Buffalo.

Q. Has National Lead Company prepared any material which portrays graphically the manufacturing story of Dutch Boy White Lead and Dutch Boy Red Lead?

A. Yes, sir.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 156 for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Respondents' Exhibit 156 for identification.)

By Mr. Ewing:

Q. I show you this document, which has been marked Respondents' Exhibit 156 for identification, and ask you whether that is the material to which you have just referred?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 156 for identification, in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: I would like to ask a question or two on identification.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. McNair, who prepared this exhibit?

2885 A. Our Advertising Department.

Q. Did you have anything to do with preparing it?

A. No, sir.

Q. Do you know whether all the material in it is factually correct or not?

A. Yes, sir.

Q. How do you know that?

A. My experience in the lead business.

Q. You have examined it yourself, then, and know it to be correct?

A. That is right.

Mr. Wright: I have no objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 156, was received in evidence.)

By Mr. Ewing:

Q. Now I take it from what you have already testified that you are familiar with the operation of plants manufacturing white lead?

A. Yes, sir.

Q. Are you familiar with the construction of plants of that nature?

A. Yes, sir.

Q. Based upon your experience with National Lead

2886 Company, are you in a position to tell us the approximate cost, in normal times, say the late 1930's, of constructing a white lead plant of sufficient size to operate economically and of sufficient capacity to serve such a number of customers?

Mr. Wright: Objection, Your Honor.

Mr. Ewing: I just asked if he was in a position to tell us.

Trial Examiner Norwood: Objection overruled. Answer it.

A. I think I am qualified.

By Mr. Ewing:

Q. Will you tell us?

Mr. Wright: Objection, Your Honor. It hasn't been shown on the record that this gentleman is qualified to make any such statement. It hasn't been shown that he has constructed any plants or has any knowledge of the cost of their construction. He is the Manager of a branch. There has been no showing that they ever constructed any plant during that period of time or that this man is familiar with construction costs during that period.

Mr. Ewing: He is Manager of the branch, he is the operating manager of the plant at these various plants, and he has run them. He has taken them down, at least. I haven't asked if he has put them up. And I think he is qualified to make such an estimate.

2887 Mr. Wright: The question was unqualified as to what was the cost of a plant. There is no telling what sort of plant the question calls for or whether it is strictly a white lead plant—

Trial Examiner Norwood: (Interposing) You can bring out those particulars on cross-examination.

Do you feel, Mr. Witness, that you can give us a reliable estimate?

The Witness: I think I can, sir.

Trial Examiner Norwood: Or approximate those costs?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

By Mr. Ewing:

Q. Now will you give us the answer, Mr. McNair?

A. Back in 1930 or thereabouts, to construct a white lead plant with a capacity of around 10,000 to 12,000 tons per year, it would run over a million and a half dollars. The same plant today would cost considerably more money, due to the increased costs of construction.

Q. Now will you tell us how white lead-in-oil is used by the painter?

A. White lead-in-oil is purchased by the painter, and he mixes linseed oil with it, approximating, for the finishing coat, 3½ gallons to the hundred, adds a little drier to it, and the tinting colors if he desires to have it tinted.

2888 To the priming coat, he would add 2 gallons of oil and 2 gallons of turpentine to the hundred, and the necessary tinting materials if he desired to tint it.

2889 Trial Examiner Norwood: That is per hundred pounds?

The Witness: A 100 pound keg, yes sir. A hundred pound keg is equivalent to about 3⅛ gallons in itself, and if you add 3 gallons of oil to it you would have 6⅛ gallons of paint material.

Trial Examiner Norwood: What is the total gallonage?

The Witness: A hundred pound keg is equivalent, to a soft paste package, to about 3⅛ gallons.

Trial Examiner Norwood: Go ahead.

By Mr. Ewing:

Q. So when you add three gallons of the other material, the thinner, to it, you have a hundred pound keg producing approximately 6⅛ gallons of finished paint?

A. That is correct.

Trial Examiner Norwood: How much lead is in that?

The Witness: A hundred pound keg of white lead averages about 89 per cent carbonate and 11 per cent oil. With the heavy paste lead it will run about 8 per cent of oil and 92 per cent of carbonate.

By Mr. Ewing:

Q. What, if you know, is the relation of the cost of white lead-in-oil to the painter as compared to the painter's total cost in doing a paint job?

A. In normal times it would run 20 to 25 per cent of the total cost of the paint job.

2890 Q. What branches of National Lead distribute white lead-in-oil?

A. All branches.

Q. I ask you to look at these sheets that have been marked Commission's Exhibits 807-A to L, inclusive, and tell us whether they set forth the branches of National Lead and the branch territories?

A. Yes; these sheets represent the branches of the National Lead Company, with their boundaries, territorial boundaries.

Q. Do you know the historical reasons for the branches and the branch territories as shown by that exhibit, and as they now exist?

A. Yes, sir.

Q. Will you give us the reasons underlying the branch and territorial set-up of the National Lead Company?

Mr. Wright: Objection, Your Honor. This witness by

his own testimony has never served in any capacity except with the Atlantic Branch of the National Lead Company. He has not been shown to have had anything to do with the policies or the operations of any of the other branches, and I strenuously object to his testimony about the larger policies of the National Lead Company in other of its branches, because it can be nothing but hearsay.

Mr. Ewing: I didn't ask him anything about policies at all. I asked him if he knew the historical reasons
2891 underlying the branch set-up and he testified that he did. Now he says that he knows it.

Mr. Wright: It can't be within his experience—

Mr. Ewing: (Interposing.) It can be within his knowledge—

Trial Examiner Norwood: (Interposing) You may cross-examine him on that, but I don't see how I can stop him from what he knows.

Mr. Wright: I have no objection to somebody from the National Lead Company who knows testifying, but I submit that this witness has never been out of the Atlantic Branch.

Trial Examiner Norwood: This isn't his opinion, this is his knowledge. You may ask him as to that, and if it develops later that it has to be struck, that may be done, but we should see what his knowledge is. Objection overruled.

The Witness: I am quite familiar with the branches of the National Lead Company because I have visited all of the branches, I have gone through all of their plants, I have conferred with them on sales records, and I am quite well versed as to the operations and the boundaries of all of our branches.

In the early days, before the National Lead Company was formed, there were a great number of white lead pro-
2892 ducers, a total approximating eighteen or twenty. These companies sold white lead in their vicinity where they could operate economically. When the National Lead Company was formed they retained these branches and practically the territorial boundaries that the old company, the original company, operated in. They retained a great many of the brands for years, there were twenty-odd—Ulster, Atlantic, Brooklyn, Jewett, Anchor, Red Seal, Collyer, Fahnestock, Beeman & Bauman—maybe I have covered twenty. If I haven't, maybe I can figure out the rest of them.

By Mr. Ewing:

Q. So that the present branch system through which National now operates is the outgrowth of the development of the company?

A. Yes, sir.

Mr. Wright: Objection Your Honor. That was a statement by counsel.

Trial Examiner Norwood: I think so; objection sustained.

By Mr. Ewing:

Q. Were National's various branches all authorized to sell Dutch Boy White Lead In Oil?

A. Yes, sir.

Q. Were the various branches permitted to sell other brands in addition to the Dutch Boy Brand?

2893 A. The Dutch Boy Brand as a trademark was adopted, I believe, in 1907. At that time they put the Dutch Boy name and the Dutch Boy trademark on the body of the package, and on the heads of the package they retained the old names of the constituent companies. In our particular branch we had four of them, and as years went by they gradually dropped these names and substituted the name Dutch Boy on the cover in place of these old names of the original companies.

Q. Does National Lead Company, in distributing and selling white lead-in-oil now use a method based upon zone or territorial differentials?

A. Yes, sir.

Q. For how long, to your own knowledge, has National Lead Company used a method of selling and distributing white lead-in-oil based upon zone or territorial differentials?

A. More than 37 years to my knowledge, because they operated on that basis when I first came with the company, prior to 1910.

Q. Based upon the knowledge acquired by you in the regular course of your duties in your long employment with National, can you state for how long prior to 1910, when you came with the company, such a method of selling or distributing white lead-in-oil has been used?

A. When it was put into effect I do not know but it was in effect when I came with the company in 1910.

2894 Q. In connection with the sale of white lead-in-oil does National now portray graphically its acceptance of territorial differentials as a basis for sale?

A. Yes, sir.

Q. I show you a map, Commission's Exhibit 580, and ask you whether that portrays in substance National's territorial differentials as now used?

A. Yes sir.

Q. Do you know the approximate date when National first employed the present zone map in connection with its sale of white lead-in-oil?

A. I believe it was between the late Fall of 1933 and the early Spring of 1934, somewhere along in that period.

Q. Prior to the use of the present zone map how did National set up its zone or territorial differentials?

A. In practically the same way.

Q. Will you tell us what you mean by that?

A. Well, they had certain differential zones, they had equalization points and delivery points.

Q. When you say that they had differential zones, what do you mean?

A. Differential zones whereby in that particular area they would add a premium over their par prices to compensate for some part of the freight.

Q. I show you a copy of Commission's Exhibit 659-C to P, inclusive and ask you to examine it.

2895 A. Yes sir.

Q. Will you tell us whether that exhibit that you have just examined sets forth National's territorial set-up during the years to which it relates?

A. Yes sir.

Q. There has been some testimony in this proceeding concerning what has been described as consumer acceptance of the Dutch Boy label. Will you tell us what the phrase "consumer acceptance" means to you?

A. The National Lead Company over the years has spent a great deal of money advertising the Dutch Boy brand. Through our sales promotional activities with the painters, the property owners and other consumers, and the salesmen's activities, plus the quality of the product which we have always striven to improve it has built up in the mind of the painter as well as the property owner a great belief in the quality and the performance that can be expected from Dutch Boy White lead.

Mr. Wright: I move that the answer be stricken. It was not responsive. The question asked him what he understood to be the meaning of the term "consumer acceptance".

Mr. Ewing: I think the first part of the answer was responsive, but I suggest that it be read back.

Mr. Wright: No sir, I don't believe he explained at all what that term meant.

Trial Examiner Norwood: Read the question and answer.

2896 (The reporter read the record as requested.)

Trial Examiner Norwood: That is what you mean by "consumer acceptance"?

The Witness: Your Honor that is how you get consumer acceptance.

Trial Examiner Norwood: Motion denied.

By Mr. Ewing:

Q. What was the consumer acceptance that you yourself found in regard to the Dutch Boy White Lead label in the course of your experience with the National Lead Company since 1910?

A. Will you repeat that again, please.

Trial Examiner Norwood: Read the question.

(The reporter read the preceding question.)

The Witness: To such a high degree that very often it has proved very embarrassing to me.

By Mr. Ewing:

Q. Have there been, during the years in which you have worked for the National Lead Company, actual expressions to you by painters and other users of white lead-in-oil of their reaction to the Dutch Boy product?

A. Many and many a time.

Q. Tell us, for example, what expressions have been made to you?

Mr. Wright: Objection, Your Honor; it is purely hearsay.

2897 Mr. Ewing: This witness has had contact with the public, Your Honor.

Trial Examiner Norwood: He is showing the public attitude as to this brand, and I think that is the only way he can do it. Objection overruled. Do you want the question read?

The Witness: No; may I answer it?

Trial Examiner Norwood: Yes.

The Witness: Painters have expressed to me often that the public is so conscious of the quality of Dutch Boy White Lead and its performance that when they take it

on a job no question is raised as to the quality of the product, and it usually stamps them as a high quality painter by virtue of the fact that the material he is using is Dutch Boy White Lead.

Mr. Wright: I move that the answer be stricken. It is purely irrelevant, self-serving and hearsay.

Trial Examiner Norwood: I don't think so; I think he should be allowed—

Mr. Wright (Interposing): The quality of Dutch Boy or any other white lead isn't involved in this proceeding.

Trial Examiner Norwood: I think he should be allowed to tell his story here with respect to the marketing of this product and the surrounding circumstances of it as bearing on the fundamental issues. In view of the breadth of
2898 our inquiry heretofore it seems to me that we should let him tell these things. The motion is denied.

By Mr. Ewing:

Q. Mr. McNair, are there Federal specifications for White Lead?

A. Yes sir.

Q. I show you a printed copy of a document described as TT-W-251b, which contains a number of subheadings among them one being "Federal Specification for White-Lead", and ask you if that sets forth the Federal specification for white-lead, directing your attention in particular to the tables which appear on page 2?

A. Yes sir.

Q. Is the document, which I now ask be marked Respondents' Exhibit 157 for identification, a copy of those schedules, except for the headings?

A. This is a copy of the specifications.

(The document referred to was marked as Respondents' Exhibit No. 157 for identification).

Mr. Welch: Your Honor, may we have a few minutes' recess while they are looking at these documents?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

2899 Mr. Wright: Mr. McNair, is this specific TT-W-251b presently in force?

The Witness: I think so. There is a supplement to that.

Mr. Wright: Does that supplement alter the basic specification?

The Witness: I don't think so.

Trial Examiner Norwood: Is this offered?

Mr. Ewing: It is identified but not offered.

Mr. Wright: I thought you had offered it.

Mr. Ewing: Go ahead and then I will make the offer.

Mr. Wright: Do you know for how long a time prior to the date of this specification which appears to be May 30, 1945 that it was in effect?

The Witness: The Government has had specifications for a number of years. They change from time to time.

Mr. Wright: I direct your attention to the statement appearing on the original document that this supersedes one of November 6, 1934, and to the note at the end of the first page that "Certain provisions in this specification are intended to conserve critical or strategic materials. When the present emergency is over this specification will be considered for revision."

Do you know what the specifications were that were applicable in 1934?

2900 The Witness: Not offhand.

Mr. Wright: You don't know what changes might have been made prior to that time?

The Witness: No, sir.

Mr. Ewing: I offer the document, Respondents' Exhibit 157 for identification.

Mr. Wright: Your Honor, the difficulty with this exhibit is, of course, that it does not contain, being an excerpt, the qualifications which appear on the original which show on its face it is an emergency measure to conserve basic material, so presumably from November 6, 1934 to May 30, 1945, the Federal specifications on these products were other than these. This would have no significance prior to May 30, 1945.

Mr. Ewing: I am willing for the record to show whatever limitations there are in the original. It is not, of course, offered as a statement of Federal specifications for any other period than represented by the original.

Trial Examiner Norwood: You are offering such portions of the original as this paper which I hold here, which has been handed me, is a copy?

Mr. Ewing: That is correct.

Trial Examiner Norwood: And counsel in support of the complaint indicates that it should contain some other portions of the original than what you are offering?

Mr. Ewing: Only the limitations, as I understand.

Mr. Wright: The limitations appear on the face of the document.

Mr. Ewing: I am perfectly willing to have the record note them just as though physically noted on this.

Trial Examiner Norwood: The limitations are as stated by counsel.

Mr. Ewing: He read them from the paper.

Mr. Wright: That is correct. Subject to those limitations I have no objection to the receipt of the paper in evidence.

Trial Examiner Norwood: The exhibit is received subject to the limitations mentioned. Do you offer the supplement?

Mr. Ewing: I just offered the copy.

Trial Examiner Norwood: The copy is received as an exhibit.

(The document referred to, heretofore marked as RESPONDENTS' EXHIBIT 157 for identification, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: I withdraw the offer of Respondents' Exhibit 157 for identification and ask that this printed document consisting of three sheets printed on both sides,
2902 be marked Respondents' Exhibit 157-A to F, inclusive, for identification.

Trial Examiner Norwood: Very well.

(Respondents" Exhibit 157 previously received in evidence was thereupon withdrawn.)

(The document referred to was marked Respondents' Exhibit No. 157-A through 157-F, for identification.)

Mr. Ewing: Now I offer Respondents' Exhibits 157-A to F, inclusive.

Mr. Wright: No objection.

Trial Examiner Norwood: The document is received as marked.

(The document referred to, heretofore marked as Respondents' Exhibit No. 157-A through 157-F for identification, was received in evidence.)

Trial Examiner Norwood: The copy heretofore presented is withdrawn.

Do you desire the substitution of a photostat?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: That may be done. Will that be furnished the reporter?

Mr. Ewing: We will ask the reporter to get the photostats for us.

Trial Examiner Norwood: And turn it in as the original.

2903 By Mr. Ewing:

Q. If my recollection is correct, Mr. McNair, I think I asked you before what you produced at the Brooklyn plants of the Atlantic branch, and I think you referred to the pulp lead shipped from Perth Amboy to Brooklyn, but went no further in your answer.

Will you tell us now what products are manufactured at the Brooklyn plants?

A. We have a linseed oil plant in Brooklyn which is adjacent to the white lead plant where we crush linseed oil. Naturally as a by-product we get cake, linseed cake.

We refine linseed oil, we produce white lead, some miscellaneous paint products, and at the Bradley plant we manufacture red lead and litharge.

Q. Where is the Bradley plant?

A. 85th and J, New York.

Q. Brooklyn?

A. Brooklyn.

Q. What is the name of the plant located at Port Richmond?

A. Jewett.

Q. And Port Richmond is where?

A. Staten Island.

Q. Referring to Federal specifications in Respondents' Exhibit 157-A to F, inclusive, I ask you whether as between brands of white lead meeting Federal specifi-

2904 cations, there is in your opinion any difference from the standpoint of performance?

A. Yes.

Q. Will you explain the differences which exist from the standpoint of performance or use, in your opinion?

A. There may be a difference in the whiteness, the ease of application under the brush, the spreading capacity—

Q. Is the difference in whiteness which you have mentioned a difference in hiding power?

A. Well, yes. There is a difference in hiding power of the lead, too.

Q. That is not the same thing as difference in whiteness?

A. No.

Q. When you say difference in whiteness you speak simply of the white color?

A. The brilliancy of it.

Q. Whereas hiding power—

A. Is the ability to cover, to obliterate.

Q. Has National Lead Company over a period of years made any effort to improve or perfect the quality of its Dutch Boy white lead products?

A. Yes, sir.

Q. Will you tell us about what efforts have been made?

A. We have constantly over the years striven to produce as high quality white lead as human ingenuity
2905 and modern machinery can make.

Periodically we buy our own brands in the open market as turned out by the various plants. The laboratory rates those and those reports are sent to the various managers of the plants.

In addition to that we also obtain in the open market our competitors' brands of lead and analyze that likewise as a basis of comparison of our quality.

Q. When you say the laboratory rates those, to what laboratory do you refer?

A. The National Lead Company's laboratory in Brooklyn.

Q. What improvements in quality are sought after in this testing work?

A. Well, ease of application, durability, whiteness and hiding qualities.

Q. When did any branch of National Lead first use the so-called agency plan for selling white lead in oil?

A. It was in the latter part of 1952.

Q. What branch of National first used that plan?

A. The Atlantic branch.

Q. Who in that branch introduced the plan?

A. I did.

Q. Who in that branch had charge of its administration?

A. I did.

Q. Was the agency plan ever used by any other
2906 of National's branches?

A. Yes, sir.

Q. When did any of National's other branches adopt the use of the agency plan?

A. The Atlantic branch put it into effect first, and then later on the Philadelphia branch adopted it and subsequent to that all the other branches adopted it.

Q. Did the Pacific Coast branch?

A. No, sir.

Q. When you answered the previous question with "All the others", you meant all others—

A. Excluding the Pacific Coast.

Q. So far as you know, has National's Pacific Coast branch ever used the agency plan?

A. No, sir.

Q. When the Atlantic branch first adopted the agency plan was there, so far as you know, any agreement by National or the branch with any other company producing and selling white lead in oil, to use such a plan?

A. No, sir.

Q. Will you tell us why you introduced the agency plan in the Atlantic branch?

A. Our brand of white lead was being offered by dealers as a loss leader. The popularity of the brand would attract painters into the stores and to encourage them in
2907 that respect they would sell white lead without profit. On many occasions they have even gone below the actual cost to themselves.

Mr. Wright: Objection, Your Honor. I move that be stricken. That is hearsay testimony which is very vague and general and without any supporting data of any sort.

Trial Examiner Norwood: I think the manager will know when they are using the stuff as a loss leader.

Mr. Wright: It has not been established.

Trial Examiner Norwood: I will ask if he is answering that of his own knowledge, and he may tell us how he knows it. You may cross-examine him on that.

Is that a motion?

Mr. Wright: Yes, sir, a motion to strike.

Trial Examiner Norwood: Motion denied. You may renew it later if you want to.

The Witness: There is more to that question if you desire to have me finish.

By Mr. Ewing:

Q. Go ahead.

A. This attitude on the part of these dealers proved

very injurious to our product because it made those that desired to make a profit unwilling to sell it due to the fact of this cut-throat competition which impelled us to do something to preserve our business, and that is how the
2908 agency plan became adopted.

Q. It was for the purpose of meeting that situation, then, that you introduced the agency plan?

A. That is correct.

Q. From your standpoint or National's standpoint as producer and seller, was there any evil involved in selling through agents on consignment?

A. Economic—

Trial Examiner Norwood: Wait a minute.

Mr. Wright: Objection, Your Honor. That calls for a conclusion on the part of the witness.

Mr. Ewing: It calls for his opinion.

Mr. Wright: It calls for an outright conclusion.

Trial Examiner Norwood: He may give us the facts about that, directed as to whether or not there is some advantage, but "evil" is a pretty broad question, even a religious question.

Mr. Ewing: I didn't use the word in a religious sense, Your Honor.

Trial Examiner Norwood: Objection sustained.

By Mr. Ewing:

Q. Mr. McNair, in your opinion, what advantages accrue to the producer, or a producer such as National, through the use of a plan involving the sale of white lead in oil through agents on consignment?

2909 A. There is an economic evil because it required us to carry an abnormal stock of white lead being in the hands of these various agents throughout the country, which gave us a much greater inventory than we would normally have if we did not have the consignment plan. Furthermore it tied up a lot of capital.

Q. What was the objection to having the abnormal inventory?

A. There would be an injury. Well, in case the pig lead market declined we would have these abnormal stocks in the hands of our distributors which would not be the case if we had the stock actually in our plant.

Q. There has been testimony in this proceeding that a proposed master code was submitted by the lead industry through Lead Industries Association in August, 1933, in

connection with the National Recovery Administration, containing a provision permitting the filing of supplementary codes.

Will you tell us whether you, with Mr. Harold Rowe, attended some meetings of the Lead Pigment Division of the Lead Industries Association or its sub groups concerned with the drafting of the supplementary code for the membership companies comprising the Lead Pigment Division?

A. Yes, sir.

Q. I show you the minutes of a meeting of the Dry Products Committee of the Lead Pigment Division, August 9, 1933, Respondents' Exhibit 135-A and B, and ask 2910 you to read those to yourself.

Trial Examiner Norwood: Are those meetings he attended?

Mr. Ewing: Yes, sir, that is the next question.

The Witness: Do you wish me to read all of this?

By Mr. Ewing:

Q. Just the first one.

A. Yes.

Q. Tell us whether you attended the meeting of the Dry Products Committee of the Lead Pigment Division on August 9, 1933?

A. Yes.

Q. In what connection were the subjects set forth at that meeting discussed?

Mr. Wright: I would like to request a short voir dire of the witness' recollection of that meeting which was 14 years ago before we get into a discussion of that.

Trial Examiner Norwood: He is using the minutes to refresh his recollection and I think counsel may ask if it does, in fact, refresh his recollection.

Mr. Wright: What is the state of your recollection of that particular meeting, Mr. McNair?

The Witness: Only by virtue of the fact that I have read these minutes and have seen that I was present.

Mr. Wright: You can't visualize the meeting and 2911 who was there and what was discussed?

The Witness: Only in a general way.

Mr. Wright: What general way?

The Witness: With reference to supplementary codes.

Mr. Wright: You don't have any independent recol-

lection, after reading that, of a particular discussion that occurred at that meeting?

Trial Examiner Norwood: Read the question.

Mr. Ewing: I will rephrase it.

By Mr. Ewing:

Q. Will you tell us generally in what connection the subjects set forth in the minutes of that meeting of August 9, 1933 were discussed?

Mr. Wright: Objection, Your Honor. The witness has already testified he does not remember any particular discussion that occurred at that meeting.

Mr. Ewing: He said he had a general recollection.

Trial Examiner Norwood: Ask him to testify from his own recollection about this matter, and if he does not remember it he may say so. That is all we can ask him to do.

Do you want the question read?

The Witness: No, sir.

Trial Examiner Norwood: Can you answer from your own recollection?

The Witness: The general discussion was in con-
2912 nection with supplementary codes, in connection with the N. R. A.

By Mr. Ewing:

Q. Now, I ask you to look at the minutes of the White Lead in Oil Committee of the Lead Pigment Division, of August 9, 1933, Commission's Exhibit 501-A to D, inclusive, and read them to yourself.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Ewing:

Q. Do you recall whether you attended a meeting of the White Lead in Oil Committee of the Lead Pigment Division of August 9, 1933?

A. Yes, sir.

Q. Have you any independent recollection with respect to your attendance at that meeting, other than as refreshed by your look at the minutes?

A. No, sir.

Q. Did you attend that meeting on August 9, 1933 of the White Lead in Oil Committee of the Lead Pigment Division?

Mr. Wright: Objection. He says he has no recollection of that meeting or of attending it.

Trial Examiner Norwood: He may recollect the fact that he did attend. Answer from your own recollection.

I overrule the objection.

2913 The Witness: Your Honor, I attended quite a few of these meetings and by referring to these minutes of that meeting I see my name is listed there, and to that extent I was unquestionably there.

Trial Examiner Norwood: That document is already in evidence.

Mr. Wright: Your Honor, by the witness' own statement this document does not refresh his recollection. He reads the document and says he was there because his name is listed there.

Mr. Ewing: He said he remembered attending a number of these meetings and when he takes a look at this one he remembers he was there.

Mr. Wright: Will the reporter read the witness' answer?

Trial Examiner Norwood: I recall what his answer was.

Mr. Wright: I don't think he should be permitted to testify when his only information is that he sees his name in the minutes.

Trial Examiner Norwood: I am going to ask him to put down the document that he was told to refresh his memory from.

Now, is there a question pending?

2914 Mr. Wright: No, sir. There was an objection to the question counsel asked on the basis of the witness' statement he had no independent recollection and he presumed since his name appeared in the minutes that he attended the meeting. That is not proper refreshment.

Mr. Ewing: Of course it is. How else can you refresh it?

Mr. Wright: Proper refreshment is when you see a document which will stimulate an independent recollection in his mind.

My objection was to counsel's question relating to this meeting, in view of the witness' statement that he had no independent recollection as to this meeting.

Trial Examiner Norwood: I think he can ask any question regarding that meeting, regardless of what he said before. He may explain that and change what he said before. The objection is overruled.

Will counsel reframe the question?

By Mr. Ewing:

Q. Will you tell us whether you attended the meeting of the White Lead Committee of the Oil Pigment Division of August 9, 1933?

Mr. Wright: May I request you to instruct the witness to answer that question from his own independent recollection as it may have been stipulated by his examination of the document, but not from what he sees in the document?

2915 Trial Examiner Norwood: I think the witness understands.

If you don't recollect, tell us so.

The Witness: I have attended quite a few of these meetings and my memory is refreshed by reading those minutes, that I did attend some at the Lawyers Club, but as to the specific date I have no recollection except that the document states I was there on August 9th.

By Mr. Ewing:

Q. In what connection were the subjects discussed at the various meetings of the Lead Pigment Division or its subsidiary committees in the summer of 1933, which you attended—discussed by the persons present at those meetings?

Mr. Wright: Objection, Your Honor. He has not testified as to the dates when he attended those meetings.

Trial Examiner Norwood: I think he may tell us what happened at the meeting even though he does not remember the dates.

Mr. Wright: He doesn't recollect any specific meeting at any specific time.

Trial Examiner Norwood: I will let him tell us what he can, and you may cross-examine him, and if he has told something he doesn't know I will strike it.

The Witness: It was in connection with supplementary codes.

2916 By Mr. Ewing:

Q. When the National Lead Company determined to use in connection with the sale of white lead in oil, a map similar to Commission's Exhibit 580 which you have seen before, this morning, and which I believe you said was put in use sometime between the fall of 1933 and the spring of 1934, so far as you know was there any agreement by it

with any other producer of that product, namely, white lead in oil, relating to the use of any such map?

A. No, sir.

Q. Again referring to Commission's Exhibit 580, the map which you have said, if I recall correctly, was put in use by National Lead sometime between the fall of 1933 and the spring of 1934, at what time was it put in use in relation to the adoption by National Lead of the so-called agency plan of selling white lead in oil on a nationwide basis?

A. Shortly thereafter.

Q. Who in National Lead established the prices at which it sold dry white lead, white lead in oil and lead oxides?

A. The general office.

Q. Will you tell us what you mean by the general office?

A. Well, the executives in the general office.

Q. As distinguished from the branches?

A. That is right.

Mr. Ewing: I ask that this document be marked 2917 Respondents' Exhibit 158 for identification.

Trial Examiner Norwood: Very well.

(The document referred to was marked as Respondents' Exhibit No. 158 for identification.)

By Mr. Ewing:

Q. I show you a document which has just been marked Respondents' Exhibit 158 for identification, and ask you by whom or under whose direction it was prepared.

A. I prepared this.

Q. What does that document which has been marked Respondents' Exhibit 158 for identification purport to set forth?

A. It sets forth the various selling schedules of the National Lead Company and the companies prior to the formation of the company, as far as those constituent companies that were taken into the Atlantic branch to market white lead.

Q. Upon what data did you prepare Respondents' Exhibit 158 for identification?

A. Historical records that I found in the office.

Q. I call your attention to the bottom of the second column where there appears the statement "Soft paste offered to trade September 1, 1927"; and I ask you to tell us what is soft paste?

A. Soft paste white lead is of thinner consistency than heavy paste white lead. It contains linseed oil and turpentine and mineral spirits.

2918 Mr. Ewing: I offer Respondents' Exhibit 158 for identification in evidence.

Mr. Wright: I would like to make a preliminary cross-examination here.

Trial Examiner Norwood: Very well.

Mr. Wright: Directing your attention to the first column, the description "white lead", what product do you mean by white lead there?

The Witness: White lead in oil.

Mr. Wright: So this entire document relates to white lead in oil?

The Witness: White lead in oil only.

Mr. Wright: Does this purport to be a complete description of all the terms and conditions which were offered on this product over this entire period of time?

The Witness: As far as I could ascertain from the records that I found.

Mr. Wright: What sort of records did you have?

The Witness: Historical records.

Mr. Wright: In what form were they?

The Witness: Various forms.

Mr. Wright: Will you describe them?

The Witness: Some were in longhand written on the stationery of those earlier days, others in printed form and others in card form.

2919 Mr. Wright: Do you have those documents in your possession still?

The Witness: I think so.

Mr. Wright: Your Honor, I object to the receipt of this document in evidence since it is based on documents which have not been made available, and there has been no opportunity for me to examine the basic material from which it was made. It is exactly in the same category as an exhibit of yesterday which was withdrawn after the basic materials had been examined.

Mr. Ewing: We will make the basic material available to him.

Mr. Wright: I don't think I should be put to the onus of later examining the basic material and then making a motion to strike on this sort of an offer, Your Honor. That is a burden that I don't believe should be placed on me.

Trial Examiner Norwood: That may be correct on something vital and directed to an issue—

Mr. Wright: The prices and terms and conditions of sale

of the National Lead Company from 1863 to 1947 certainly go to the vital issues in this matter.

Mr. Ewing: I would say the prices of the Atlantic branch and its predecessors based upon records in the possession of Mr. McNair.

Mr. Wright: The document does not say that. It 2920 says "National Lead Company, changes in selling schedules, 1863 to 1947."

Trial Examiner Norwood: I merely started out to discuss the degree of availability which should be required, but the discussion took another turn.

Until this appears to be vital it seems to me like counsel's statement that he will make the material available to counsel in support of the complaint, is sufficient, isn't it?

Mr. Wright: No, sir, it is not. This is secondary evidence which should not be admitted unless the primary evidence is not available. Yesterday we had tabulations which were in error here, which had not been properly prepared.

Trial Examiner Norwood: Should the Commission be required to send its Examiner to the office of the Respondent and examine the basic material there and check it?

Mr. Ewing: We will bring it to him next week.

Mr. Wright: We will be in New York next week.

Mr. Ewing: And I will have to break in on Mr. McNair again and bring him out of town at a waste of time. You and I have to be there anyway.

Trial Examiner Norwood: I will hold this in abeyance like the other two until counsel on the other side is satisfied he will have an opportunity to object. I will reserve the ruling on 158 until we can make further arrangements about checking.

Proceed.

2921 By Mr. Ewing:

Q. To what types of use does soft paste lend itself?

A. For the painting trade.

Q. To what type of use does heavy paste lend itself?

A. The painting trade and other uses.

Q. What other uses?

A. The car builder uses it for putting on car wheels; it is used in making up putty by the painter; there are many uses.

The difference between heavy paste and soft paste is that the soft paste is of a more fluid consistency and the

painter can turn it into paint more readily than he can heavy paste.

Q. So far as you know during your connection with National Lead Company, has it at any time ever entered into any agreement with any other company producing white lead or lead oxides, relating to prices?

A. No.

Q. So far as you know, has it ever entered into any such an agreement relating to the setting of zone differentials or territorial differentials?

A. No.

Q. So far as you know has it ever entered into any agreement relating to quantity discounts?

A. No, sir.

2922 Q. So far as you know has it ever entered into any agreement relating to districts of production?

A. No.

Q. So far as you know has it ever entered into any agreement relating to customer allocations?

A. No.

Q. So far as you know has it ever entered into any agreement relating to uniform terms of sale except to the extent that such uniform terms of sale may have been adopted in the code for the lead industry?

A. No.

Mr. Ewing: I ask that these photostats, ten sheets in all, be marked Respondents' Exhibit 159-A to J, inclusive, for identification.

Trial Examiner Norwood: Very well.

(The documents referred to were marked as Respondents' Exhibits 159-A through 159-J, for identification.)

Mr. Ewing: Off the record.

(Discussion off the record.)

By Mr. Ewing:

Q. I show you, Mr. McNair, the originals of ten documents, photostatic copies of which have just been marked Respondents' Exhibit 159-A to J, inclusive, for identification, and ask you to tell us generally what they are.

A. They pertain to marketing policy.

2923 Q. Are they part of the files of the Atlantic branch?

A. This letter?

Q. Yes.

A. It was gotten out of the Atlantic branch.

Q. When did you first see these documents?

A. About ten days ago.

Q. When I say "first" I mean at the present time; I mean now and not back in 1934.

A. I saw the document back in 1934, but I only saw these letters about ten days ago when they were found in our office.

Q. Will you tell us the circumstances under which you found them?

A. I was endeavoring to refresh my recollection on certain sales policies, and I went to a young lady in the office who has been there for a number of years, even though she is young, and asked her if she had anything pertaining to prices or as to our selling policies on our various products, and she went through her desk and pulled out these letters and gave them to me.

Q. Now, I direct your attention to Respondents' Exhibit 159-A which appears to be a memorandum dated June 9, 1934, addressed to all branch managers from Harold Rowe, and ask you whether the Atlantic branch received that?

A. This top letter?

Q. Yes.

2924 A. Yes, we received it.

Q. Prior to that had you received the document which has been marked Respondents' Exhibit 159-B for identification, appearing to be a memorandum dated May 11, 1934, addressed to Branch Managers, from Harold Rowe?

A. Yes.

Q. I call your attention to the next to the last paragraph of the May 11, 1934 memorandum, Respondents' Exhibit 159-B for identification.

A. These are not marked with any identification number at all.

Q. That is why I am giving you the date. It is the second one, next to the last paragraph.

A. What is your question, Counsel?

Q. I ask you whether you received with that memorandum of May 11, 1934, the eight accompanying sheets which appear to be instructions, interpretations, referred to in the May 11, 1934 letter?

A. Yes.

Q. Were those documents all received by Atlantic branch from the general office of National Lead?

A. Yes, sir.

Q. In the regular course of business?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 159-A 2925 to J in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

(The documents referred to, heretofore marked as RESPONDENTS' EXHIBITS 159-A through 159-J, were received in evidence.)

Mr. Ewing: That closes the direct examination, Your Honor.

Trial Examiner Norwood: Cross-examine.

Mr. Wright: I suggest, Your Honor, we recess for lunch now and reconvene at 2 o"clock.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing: Right.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:10 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

2926 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: The hearing will be in order.

Mr. Ewing: Before Mr. Wright starts his cross-examination, there are two or three more questions I would like to put to Mr. McNair.

Trial Examiner Norwood: Go ahead.

JOHN GORDON CRAWFORD McNAIR resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Ewing.

Q. I show you again Respondents' Exhibit 158 for identification, which you have testified you had prepared, and ask you to tell us how you came to prepare the information set forth on that document?

A. I was interested in finding out the various sales policies, as far as pricing is concerned, that the National Lead Company had.

Q. At what time was that?

A. When I made this original chart up, it was about 10 years ago, since which time I have brought it up to date.

Q. And on what dates did you make the original chart up?

A. I don't understand the question.

2927 Q. I mean did you make it up about 10 years ago, bringing it back as far as it goes, and up to 10 years ago; or was it in the form of a record which you kept from time to time as the years went by with the company?

A. After I originally made it up, from that time on I recorded changes which occurred from the time the original chart was made up.

Q. When you say "original chart", you are not referring to this particular one?

A. Not this particular one, no.

Q. And that original chart was made up at least 10 years ago, approximately?

A. At least 10 years ago.

Mr. Ewing: That is all.

Trial Examiner Norwood: Proceed with the cross-examination.

Cross-Examination by Mr. Wright.

Q. What was your capacity with the National Lead Company during the period from about 1930 to 1939, Mr. McNair?

A. Assistant Manager.

Q. You were Assistant Manager, then, at the time of these meetings which were referred to on direct?

A. I think so.

Q. When you attended those meetings, in what 2928 capacity did you attend them? Were you representing the National Lead Company at those meetings?

A. No, I attended with Mr. Harold Rowe.

Q. You went along with him?

A. Yes.

Q. Did you participate in those meetings?

A. In the discussions?

Q. Yes.

A. Undoubtedly I did.

Q. Mr. Rowe was representing the company, though?

A. Officially, yes, sir.

Q. Now will you explain to us the original breakdown of the National Lead Company as between the general offices and the branch offices?

A. The branches have a manager, who has jurisdiction over the branches. The general office contains the top executives, which dictate policies to the branches.

Q. What matters of policy are generally passed on from the general office to the branches?

A. Price changes and other pertinent facts in connection with the operation of the business.

Q. Are general policies as to terms and conditions of sale passed on?

A. Yes.

Q. Types of contracts?

2929 A. That is correct.

Q. Those are all determined in the general offices?

A. Yes, sir.

Q. So that the branch manager would not be in position to initiate any change in policy of any importance regarding the marketing of these products?

A. That is correct.

Q. You stated this morning that in 1939 it was your estimate that it would cost a million dollars or over a million dollars to construct a white lead plant of 10,000 tons annual capacity, is that correct?

A. No, sir, I think I said in the period around 1930 to 1932 or 1933—I don't think I mentioned 1939.

Q. Now for what process would that plant that you are speaking of now, be designed? Would that be an Old Dutch plant or a Carter plant?

A. The Old Dutch plant is practically a thing of the past.

Q. What process were you thinking of when you made that estimate?

A. The Carter process.

Q. How many of the white lead plants are—I am confining this only to those of the National Lead Company—how many of the white lead plants in existence now are of 10,000 tons capacity or more?

A. I am not so sure about the Pacific Coast, but
2930 the other branches would have at least 10,000 tons.

Q. Would that apply to your competitors' plants, too, or wouldn't you know?

A. Oh, I wouldn't know that.

Q. How would you break that million dollar cost down; what factors were you taking into consideration?

A. The cost of machinery, the building, the property, the equipment.

Q. Will you break that down into the component parts?

A. As to the cost of each?

Q. Yes, sir.

A. I couldn't do that.

Q. Well, how did you arrive at that figure, if you can't do that?

A. Because I have had a great deal of experience in the building of our plants, the additions that we have built, getting new equipment to improve our process, improve our product.

Q. Well, if you don't know the parts that go into the whole, how can you know the whole? How did you arrive at that figure of over a million dollars?

A. I gave an estimate of over a million and a half. Now it is quite possible that it may run many thousand dollars over that.

Q. What did you allocate, in your mind, to actual processing machinery, out of that total?

2931 A. Well, I couldn't answer that question, sir. It is a general figure that I gave.

Q. Well, it is just an opinion, then, isn't it?

A. Based upon my knowledge of a white lead plant.

Q. What I am trying to get at is what is that knowledge of costs, now?

A. Well, right now, or do you mean back in 1930?

Q. I am talking about back in the period about which you testified.

A. Well, I had occasion to buy a lot of equipment. We were making alterations to the plant, and I have a general idea what construction costs were, and what machinery cost.

Q. How much machinery or what machinery is necessary to the operation of such a white lead plant?

A. Cylinders, tubs, washing equipment, roller mills, pug mills, blow drums, motors—those are the vital items of equipment.

Q. That is the main factory machinery that is necessary?

A. That is right.

Q. How much floor space is required for such a plant?

A. Well, you would have on your floor with your cylinders, probably the building would be at least 200 feet long by 50 or 60 feet wide.

Q. That is the total plant area?

A. No, that is for the cylinders alone.

2932 Q. Those are the cylinders where you corrode the lead, is that right?

A. That is right.

The blow drum would probably occupy an area 60 x 80. Your washing equipment and tubs, and so forth, would probably occupy an entire floor under the cylinder floor. You would have a power plant.

Q. How much of that "over a million dollars", then, would be in machinery and equipment as distinguished from—

A. (Interposing.) From the building itself?

Q. As distinguished from the building and premises.

A. I would say the machinery in a white lead plant of that description would probably run $650,000.

Q. Now the Jewett Plant at Port Richmond, you stated that that was a plant that had 12,000 tons capacity of white lead?

A. That is right.

Q. And that produced only white lead?

A. That is right.

Q. It didn't produce red lead and litharge?

A. No, sir.

Q. How much was that plant carried on the books of the National Lead Company at while it was in operation?

A. That particular plant was carried close onto a million dollars.

Q. Now these plants that you referred to earlier
2933 at Cincinnati, Boston, Cleveland, Pittsburgh, and Buffalo, when were they last in operation?

A. I really don't know. The Boston plant has been down for a great number of years. The Cincinnati plant I believe was down in 1930. Did you mention Pittsburgh?

Q. Yes, sir.

A. Pittsburgh probably along the same time, but I am not so sure about those dates.

Q. Was that the National Lead Company of Pennsylvania that operated that Pittsburgh plant?
A. Yes, sir.
Q. At how much was that carried on the books of the company?
A. I don't know, I wouldn't know.
Q. What was the capacity of that plant?
A. I wouldn't know.
Q. Do you recall the capacity of the Cincinnati plant?
A. No, sir.
Q. How about the Buffalo plant?
A. No, sir.
Q. How about the Boston plant?
A. No, sir.
Q. You spoke this morning of the National Lead Company historically being composed of a number of plants at all these various different branches who served particular territories in which they were located, was that your testimony?
2934 A. That is right.
Q. Were they large plants, generally, or were they small ones, or do you know what size and capacity they were?
A. I would say offhand, outside of those particular plants that we had in the New York area and Philadelphia, they were relatively small plants in comparison.
Q. About how many tons do you mean, roughly?
A. I mean the size of the plant.
Q. Well, that would determine their capacity, wouldn't it?
A. That is right.
Q. Well, can you give us an estimate of what their capacity was?
A. No, I could not.
Q. Was it as much as 10,000 tons?
A. I couldn't answer that question.
Q. What is the capacity of your largest plant, white lead plant?
A. At Chicago.
Q. What is that capacity?
A. Probably about 18,000 to 20,000 tons.
Q. Is that one of the largest plants in the business?
A. Yes, sir.
Q. How does the Perth Amboy plant compare with that?

A. About three-quarters of that.

Q. Is that also considered a large plant?

2935 A. Yes, sir.

Q. So a 10,000 ton plant, then, would be a large plant, would it not?

A. It is a fairly large plant, yes.

Q. Do you know whether there have been, in your experience in the industry, plants operating with less than that capacity?

A. I testified this morning that we had the Matheson plant that had a capacity of around 7,000 tons.

Q. I suppose the cost of construction of the smaller plant would be correspondingly lower?

A. That is correct.

Q. So the effect, then, of the disbanding of these various branch plants, with their local territories which they served, was to give wider distribution to the remaining plants of the National Lead Company?

A. A greater production.

Q. A greater production and wider distribution?

A. To enable us to operate the existing plant at its maximum capacity, which is the most economical basis to operate a white lead plant on.

Q. What linseed oil plants does the National Lead Company operate?

A. Two.

Q. Where are they located?

A. Philadelphia and Brooklyn.

2936 Q. The production and marketing of that product is under your jurisdiction, too?

A. The New York plant, yes.

Q. How do you quote and sell linseed oil?

A. By the pound.

Q. What territorial differentials do you have on linseed oil?

A. We have a territorial differential on linseed oil.

Q. Is that in the form of zones?

A. A zone differential, yes.

Q. Roughly what is the par zone on linseed oil?

A. Minneapolis and Chicago.

Q. I don't understand you. You say Minneapolis and Chicago are the par zones?

A. The par territory is Minneapolis and Chicago. The reason for that is that that is the flax seed belt.

Q. What territory is Eastern Seaboard, New York and Pennsylvania?

A. Three-tenths of a cent over par.

Q. How many zones are there for linseed oil?

A. I couldn't answer that.

Q. How many zones are there in the territory with which you are familiar?

A. There are three.

Q. What are those zones?

A. New York—as far as our branch is concerned,
2937 we consider that par in our branch. Florida and Georgia on the Seaboard have a differential; and Macon, west of Macon has a higher differential than Seaboard.

Q. Those are the three areas in which you—

A. (Interposing.) In our branch, yes, sir.

Q. What is the Lenox process?

A. It is a precipitated process.

Q. Is that presently being used by the National Lead Company?

A. No, sir.

Q. How does that work,—do you put lead into solution?

A. Well, eventually you get it into solution. The lead is feathered and put in a tub and sprayed with acetic acid, and it is carbonated that way by precipitation.

Q. Does the National Lead Company use the electrolytic process?

A. No, sir.

Q. Do they use the Old Dutch process at any of their plants?

A. No, not now.

Q. What physical differences are there in white lead produced by the various different processes, Mr. McNair?

A. Well, there is a difference in the fineness of the particles.

Q. Is there a difference in color?

A. Yes, there is. The Dutch process has more yellow color to it than the Carter process. The Carter pro-
2938 cess is a very white process.

Q. How does the Carter process compare with the electrolytic process?

A. In whiteness?

Q. Yes, sir.

A. About the same, I should say.

Q. Are there any differences in Carter and electrolytic processed white lead?

A. Well, there may be a slight difference in the fineness of the particles.

Q. Is there any difference in hiding power?

A. Well, it depends upon the plant. It is possible when manufacturing under the Carter system that the product in some plants would have greater hiding than that in some other plants using the same system.

Q. Who was the Carter process developed by?

A. I couldnt answer that.

Q. Does that have any relation to the old Carter White Lead Company, Mr. F. M. Carter?

A. Whether the Carter process was used prior to the formation of the Carter Lead Company, I wouldn't know.

Q. You don't know the origin of the process?

A. No, I do not. The oldest process is the Dutch process.

Q. The Matheson Lead plant, when was that acquired by the National Lead Company?

2939 A. I couldn't give you the date accurately; I don't know.

Q. Was that prior to your service with the company?

A. Yes.

Q. Was that a previously independent operation?

A. Yes.

Q. How about the Jewett plant at Port Richmond?

A. The Jewett plant was taken into the company at the time of its organization, I believe.

Q. It goes back, then, to 1890, or so?

A. Yes.

Q. How about the plant at Cincinnati, when was that acquired?

A. I wouldn't know.

Q. How about the Boston plant?

A. I wouldn't know.

Q. How about the Cleveland plant?

A. I wouldn't know.

Q. The Pittsburgh plant?

A. I wouldn't know.

Q. The Buffalo plant?

A. I wouldn't know.

Q. Does the National Lead Company still manufacture white lead-in-oil for the duPont Company?

A. Yes.
Q. Under contract arrangements?
A. I don't know what their arrangement is.
2940 Q. That is handled in the general offices?
A. That is right.
Q. You supply that from the Atlantic Branch, however?
A. We do.
Q. Do you supply that in package form?
A. Yes, sir.
Q. With the duPont label on it?
A. Yes, sir.
Q. What would be the cost of construction of a litharge plant of 10,000 tons annual capacity, say, back in 1939?
A. Of 10,000 tons capacity?
Q. Yes.
A. To manufacture litharge only?
Q. Well, I will amend the question. We will make it a red lead and litharge operation to produce 10,000 tons, combined, of the two.
A. Then you would get into a much greater expense. If you manufactured litharge alone, a plant back in 1930 or thereabouts would not be a very expensive plant, probably $200,000 would have covered that.
Q. That is just a roasting operation of the pig lead, is that right?
A. Well, it all depends upon how it is made.
Q. How much would the added red lead cost be?
A. Then you would have to have additional equipment.
2941 Q. Do you know what the capacity, approximately, of the Eagle-Picher Company in Jersey is?
A. No, sir.
Q. Is that a large plant?
A. I wouldn't say it is the largest in the country. It is a fair sized plant.
Q. What would be the capital investment, in the 30's, for a plant of about that size?
A. In the 1930's?
Q. Yes.
A. I have never been in that plant, I have only seen it passing by on the train, so it is a rather hard question to answer. I don't know what equipment they have in there, or how much they produce.
Q. You are familiar with the Evans plant down in Charleston, West Virginia, are you not?

A. No, sir, I am not.

Q. What is the capacity of your red lead and litharge plant in Brooklyn?

A. We have gotten as high as 29,000 tons out of that plant.

Q. Is that the only plant in the Atlantic Branch that produces those products?

A. Litharge and red lead?

Q. Yes.

A. No, sir.

2942 Q. What other plants produce that?

A. Perth Amboy.

Q. What is the capacity of that Perth Amboy plant?

A. At that particular plant they could turn out about 20,000 tons.

Q. At what is that plant carried on the books, the red lead and litharge plant?

A. We don't make red lead there, just litharge.

Q. At what is that plant carried on the books of the National Lead Company?

A. We have just constructed that particular unit.

Q. What is the capital investment in that?

A. In that particular plant, I would say about $450,000 or $500,000.

Q. That is just the litharge end of the plant?

A. That is right.

Q. That is a 20,000 ton plant?

A. Yes, sir.

Q. Now it has been testified here that a battery manufacturer, for instance, can produce litharge and red lead profitably on his own account if his consumption is 4,000 tons a year or more. About what would be the capital investment, in the 30's, in a 4,000 ton litharge and red lead plant?

A. Probably $650,000 to $800,000.

Q. For a 4,000 ton plant?

A. Yes.

2943 Q. What would make the difference between that expense and the expense of the plant that you have just now constructed for 20,000 tons of litharge?

A. Well, that particular plant—you have to have a certain amount of equipment to produce 4,000 tons, but that plant may be capable of turning out seven or eight thousand tons with the same equipment.

Q. So, then, your testimony was with regard to one that had a capacity of about eight thousand tons?

A. No. There is a minimum amount of equipment that you must have necessarily in order to have an oxide plant, and if you want to have a production of 4,000 tons you have to have that minimum equipment.

Q. What is that minimum equipment?

A. It consists of furnaces, mills—

Q. (Interposing.) How many furnaces?

A. For 4,000 tons?

Q. Yes, sir.

A. To turn out red lead or oxide?

Q. Red lead and litharge, half and half; or, say 3,000 tons of litharge and a thousand tons of red lead.

A. You see red lead and litharge are made in different ways. To produce red lead you have to have more equipment.

Q. Isn't it correct that red lead is a further refinement or processing of litharge?

2944 A. That is right.

Q. Take a plant now that a battery manufacturer would be interested in, which is designed to produce 3,000 tons of litharge and 1,000 tons of red lead each year, for an estimated average consumption of 4,000 tons a year, just about what equipment would be necessary to make that average production?

A. You would probably require eight or ten furnaces, with the necessary equipment for charging and discharging, grinding, packing and so forth.

Q. Would those furnaces be capable of handling both the litharge and the further refining into red lead?

A. In certain processes, yes, sir.

Q. About what would that cost at pre-war construction prices?

A. A furnace?

Q. Yes.

A. You could probably build an oxide furnace for fourteen or fifteen thousand dollars.

Q. What does your charging and other handling equipment for a furnace run to?

A. Well, I couldn't answer that offhand.

Q. About how much would your grinding and other refining and screening equipment for handling the production of eight furnaces run to?

A. At the present time?

Q. No, prior to the war.

2945 A. I couldn't answer that question authentically.

Q. Are you familiar with the Atlanta plant of National?

A. No, sir.

Q. I thought you were familiar with all the operations of the various branches?

A. Those are oxide plants; I have very little to do with oxides in our business. White lead plants were what I was talking about.

Q. Doesn't the Atlantic Branch handle oxides and litharge and red lead?

A. That is right.

Q. You stated this morning that the cost of white lead would run to around 20 per cent of the cost of paint jobs, is that correct?

A. I thought I testified to the fact that the materials cost of a painting job averaged between 20 and 25 per cent of the total cost of the painting job.

Q. You meant all material costs?

A. That is right.

Q. On what do you base that estimate?

A. From actual knowledge of what I know to be true myself.

Q. What is that knowledge, how do you break it down?

A. Say a paint job costs $125, if you pay $25 for your materials, that gives you a percentage. It is a figure which is more or less recognized in the industry.

2946 Q. Did you make any study to determine that?

A. It wasn't necessary.

Q. How did you find it out?

A. From my actual experience.

Q. As a painter?

A. No, as a salesman in my contacts with painters.

Q. You stated this morning that you had used zones prior to 1910, in quoting on white lead-in-oil?

A. I did.

Q. What zones did you use prior to 1933 or 1934?

A. I couldn't answer the question as to what zones there were at that time, because when I started out as a salesman for the first time with the company I travelled in Georgia and Florida and there was a zone differential down there at the time.

Q. When you were speaking of zone differentials did you mean the differentials which appeared on Commission's Exhibit 659, the list of differential points?

A. I don't recognize the exhibit number.

Q. Well, look at this exhibit.

A. That (indicating) is a zone differential there in Florida.

Q. What do you mean by "that is a zone differential"? How did you make prices on that?

A. Half a cent over par.

Q. Was that a price to Jacksonville only?

2947 A. That is right.

Q. Then how would you make a price to Miami?

A. The price to Miami would be equalized with Jacksonville.

Q. What do you mean by that?

A. If a customer in Miami desired to purchase white lead, and if the rate from New York to Miami was, we will say, 85 cents a hundred, and from Jacksonville to Miami, 50 cents a hundred, the customer would only pay the fifty cents.

Q. In other words he would pay the half cent extra to Jacksonville plus the 50 cents difference in freight rates?

A. That is right. In other words, it would not cost a customer any more buying white lead if we shipped it direct out of New York than if he got it out of Jacksonville.

Q. That then really amounted to the price at Jacksonville plus the freight from Jacksonville to Miami?

A. If that freight was less than from New York, yes.

Trial Examiner Norwood: Jacksonville, then, is the shipping point there?

The Witness: No, sir, that is the equalization point.

By Mr. Wright:

Q. Are all these other points on here, then, equalization points?

A. No, sir; these (indicating) are delivery points.

Q. What is the difference between an equalization point and a delivery point?

2948 A. We deliver free of charge to a delivery point and we do not equalize any other shipments in that area with those points; whereas, in the case of an equalization point, we equalize the freight with that equalization point for shipments made in that area.

Q. For instance, then, take a point in the State of Vermont. You have Bellows Falls, Brattleboro, Montpelier, Rutland, St. Albans and St. Johnsbury as delivery points, and Burlington as an equalization point. Assuming, now, that you wanted to quote to a customer in some other place in Vermont than those that are listed there, how would you make your price to him?

A. If the rate from New York to the point in question was greater than that from Burlington to that particular point, than we would equalize with Burlington.

Q. Equalize with Burlington?

A. Yes.

Q. But, for instance, if a man were 20 miles out of one of these delivery points?

A. We wouldn't ship it.

Q. You would equalize it—

A. (Interposing.) We would not pay the freight on that; we would only pay the freight to delivery points.

Q. Well, then, would you charge him the price at the delivery point, plus what his freight was from that
2949 delivery point to his destination?

A. Say that again, please.

2949 Q. Would you charge him the price at the delivery point, twenty miles away, plus the freight from the delivery point to destination?

A. We will deliver free of charge to a delivery point. For a point outside of a delivery point, which is not an equalization point or a delivery point, the customer pays the freight.

Q. In other words, for a man twenty miles out of St. Johnsbury, for instance, you would ship it to St. Johnsbury?

A. Oh no.

Q. You would ship it directly to him?

A. Directly to him, and he would pay the freight.

Q. He would pay the freight from New York?

A. That is right, on this schedule here.

Q. And that would be equalized with Burlington if that made any advantage to the customer?

A. That is right.

Q. Now in this method which is outlined in this exhibit, and about which you have been testifying, were there any territories in which a flat price prevailed?

A. You mean par territory?

Q. Yes.

A. Yes, the New York area is par territory.

Q. The New York area?

2950 A. Yes, sir.

Q. But there were no areas, say of a half a state, or a state, where everyone in the state received the same price regardless of his location, under that old method?

A. I don't quite get the question.

Q. Under the present method, using your zone map, everyone in the State of Tennessee, wherever located, pays the same flat delivered price, does he not?

A. I am not so familiar with Tennessee, it is not in my jurisdiction.

Q. Take Maine, then.

A. That is right.

Q. Were there any similar territories under this old method where everyone within the borders of a state or a large area paid the same flat price?

A. Take the State of New Jersey, they all received a flat price in the State of New Jersey.

Q. Under this old method?

A. Yes—

Q. (Interposing.) In other words every town was a delivery point?

A. It later on developed that way.

Q. What was it at the time of this exhibit, which is 1921?

A. I would have to examine that a little more closely.

Q. Here is the New Jersey listing here.

2951 A. This is 1924, is that the one you want?

Q. Yes.

Trial Examiner Norwood: What exhibit number is that?

Mr. Wright: Commission's Exhibit 659-C.

A. Back in that particular time the customers located in Connecticut other than those designated here, would pay their own freight.

By Mr. Wright:

Q. How about New Jersey?

A. It has practically every town listed in New Jersey that we ship to as a delivery point there, but should there be a town not listed here, they would pay the freight on it. In other words this record indicates whether or not we would allow freight to the customer, or equalize the freight to the customer.

Q. Now this is dated in 1924. Can you tell us what changes were made in that from 1924 to 1933, up to the time—

A. (Interposing.) I wouldn't remember the changes that took place.

Q. Were there any radical changes in method?

A. I couldn't answer that; that is too long ago for me to remember.

Q. You were speaking this morning about the fact that Dutch Boy has certain quality differences in the ease of breaking, ease of application, spreading, whiteness
2952 and hiding power. What factors make the differences in quality of Dutch Boy in those respects?

A. Well, the efficiency of manufacture, I would say.

Q. You mean now the processes that you use?

A. No, the efficiency of operation in the manufacturing processes. You might compare that with a cook getting flour, and two cooks will produce different grades of pie out of the same raw materials.

Q. Which ones of your competitors use the Carter Process in producing white lead-in-oil?

A. I don't think any of them do, to tell you the truth.

Q. What process does Eagle-Picher use, do you know?

A. They used to use the Old Dutch Process. Sherwin-Williams used the Old Dutch Process at one time; whether they do now or not I don't know. Anaconda uses the electrolytic process.

Q. Do the differences in the processes of manufacture have any effect on the ease of breaking and of application, and hiding power and whiteness, and spreading?

A. They could.

Q. How about Eagle white lead, is that an inferior product to your product?

A. I think that the National Lead Company makes the highest quality of white lead on the market today, and that is brought about by the fact that we have several plants that are in competition with each other all the time to
2953 improve the quality of their lead; and, modestly speaking, I would say that the Atlantic branch has the best quality of the entire company.

(Laughter.)

Q. Is any white lead that you make and market sold under any other brand than Dutch Boy?

A. Yes, the Dutch Boy White Lead and the trademark appear on all of our packages, but as I testified this morn-

ing these older brands have been gradually dropped. Now in the Atlantic Branch we used to have four or five different brands. Today we only have two and those are the Dutch Boy Brand and the Atlantic Brand. The Brooklyn and the Ulster and the Union and Jewett brands have been dropped, discontinued.

Q. But the Atlantic Brand still has the Dutch Boy label on the side of the keg?

A. Oh yes.

Q. And it is known as Dutch Boy lead?

A. All the brands of the National Lead Company carry Dutch Boy Lead and the trademark on the package.

Q. They are all sold at the same price?

A. Yes, sir.

Q. How does lead produced by the electrolytic process compare in these qualities that we have been speaking of, particularly as to whiteness?

A. It is very white.

Q. Do you recall any instances in the industry
2954 when comparative tests were made showing the relative whiteness of the leads?

A. Oh yes.

Q. Will you tell us again, Mr. McNair, about this cut-throat competition and "loss-leader" selling that you referred to this morning on direct examination, as to white lead-in-oil?

A. Tell it over again?

Q. Yes.

A. Due to the popularity of the Dutch Boy trademark and its ability to attract customers to a point store, many distributors for selfish motives would market our brand of white lead at cost or at times below cost, to influence customers to come into their store.

Q. Who were these dealers that did that, who engaged in that practice?

A. There were a great many of them in the New York area. I could name you a dozen or twenty of them if you would like to have them.

Q. Was that confined principally to the New York area?

A. No, sir.

Q. At what other points in the country did the company encounter that situation?

A. In my conversation with other branch managers it was more or less prevalent in all large trading areas.

Q. Do you know the reasons these people sold 2955 Dutch Boy at low prices?

A. I specified that reason.

Q. And the agency plan then was one that was designed to correct that situation?

A. That is correct.

Q. Did it prove effective in correcting the situation?

A. It did.

Trial Examiner Norwood: Would they ever cut the price without cutting it down to cost?

The Witness: Oh yes, yes sir. I only recall one area where they actually sold it below cost, and that was in Paterson, because there was a particular dealer out there who was trying to put his competitors out of business.

By Mr. Wright:

Q. That is the only instance that you can recall of a sale actually below cost?

A. In the Paterson area, yes.

Q. The other sales were made only below your suggested resale prices?

A. They were made at cost in many instances, ranging right up to our list price.

Q. This was effective in preventing them from selling below your list price, this agency plan, was it?

A. That is correct.

Q. And that was the purpose of it, to control the 2956 resale price of your product?

A. That is correct, yes.

Mr. DuBose: I object to that. Will you read the question again. I think there were a few words in there that weren't quite clear.

(The reporter read the preceding question.)

Mr. Ewing: I object and move to strike the answer on the ground that under the agency plan there was no resale price; that is a misnomer. The goods were consigned to the agent and they were our goods, and he resold them at retail.

Trial Examiner Norwood: This witness is telling the story; the objection is overruled.

By Mr. Wright:

Q. Do you recall ever taking any dealer's agency away for failing to adhere to the prices in the agency contracts?

A. There may have been some instances, but very few.

Q. Do you recall receiving, in that period from 1933, on, complaints from other dealers of violations of those agency agreements?

A. We have had those complaints, yes sir.

Q. Did you check up on those complaints when you received them?

A. Yes.

Q. You made an effort to determine that those contracts were being lived up to by dealers?

2957 A. That is correct.

Q. How did you classify your accounts as between dealers and agents, when you first set up your plan?

A. The lead was sent to the agents on consignment, and it was in our control the entire time.

Q. After you embarked on the consignment plan, when you did decide to sell a dealer how did you determine whether he was to be an agent or a dealer?

A. In the Atlantic Branch we didn't sell to dealers.

Q. You had no accounts with dealers?

A. No, it was all through our agents.

Q. Were there retailers who handled Dutch Boy products who could not buy direct from you but who purchased from agents for resale?

A. Yes.

Q. How did you determine whether a man could be an agent or whether he had to purchase through an agent?

A. Well, we selected our agents, those distributors that we thought would be desirable. They were hand picked.

Q. And were some of the customers who had theretofore bought direct from you prevented from buying direct after that?

A. That is correct.

Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?

2958 Mr. Ewing: I object to that—"buy direct on the agency basis".

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?")

Trial Examiner Norwood: I don't understand that.

Mr. Wright: It is a perfectly clear question. The witness is ready to answer and he understood it.

Mr. Ewing: The contracts are in evidence and they are proper contracts carrying out the agency plan. They don't buy direct.

Trial Examiner Norwood: There is a confusion there.

Mr. Wright: These contracts are already in the record and the relationship is plain and this witness is thoroughly familiar with it and I think should be permitted to answer a perfectly legitimate question of that sort without having an objection which may be just a modification of his answer.

Mr. Ewing: I am objecting to certain phraseology in the question which is at least the subject of legal construction.

Trial Examiner Norwood: Will you read the last question again, please?

2959 (The question was reread by the reporter as follows:

"Q. And they paid a higher price then, did they not, for their lead, than if they had been able to buy direct on the agency basis?")

Mr. Ewing: That implies a legal conclusion.

Trial Examiner Norwood: As I understand there wasn't any buying on the agency basis.

Mr. Ewing: But if there is a question about it it should not be put in the question propounded to a layman.

Trial Examiner Norwood: Can't you straighten that out, Mr. Wright?

By Mr. Wright:

Q. If these people, after establishment of your policy of agency, had been agents and had the margin between the agency price and the resale price, they would have realized a larger gross on their sales of white lead. Is that not correct?

Mr. Ewing: I object to that, the agency price. Let's not ask the questions with the words in them that may be misleading.

Mr. Wright: The National Lead Company consigned the material to the agents and when the agents sold it they sent in a report and were billed for the difference between the National Lead Company's agents price and the sales price, and they received that margin between the so-

2960 called agents price and the sales price.

Mr. Ewing: I have no quarrel with the fact that there is an agents price, but let's not characterize it.

Trial Examiner Norwood: You may answer it with the explanation of the term "price" as used in the question.

The Witness: Direct from the National Lead Company —was that the question?

By Mr. Wright:

Q. Yes.

A. The agents were reselling the National Lead Company in the sales of our white lead.

Q. What compensation did the agents receive from the National Lead Company for selling your white lead at retail as compared to the difference between the price to the dealer and the suggested resale price?

A. The agent received a commission for his sales. It changed from time to time.

Q. In 1940 what was the difference?

A. At one time—the exact date I don't recall—but the agents commission was 10 and 10.

Q. I believe it is shown in the record that sometime in 1937—I think it was 1937 and I am willing to stand corrected on that—you discontinued the 10-10-2 and went on flat schedules so that you had no percentages involved, so that you had a list price, a painter price, a dealer 2961 price and an agent price.

A. That is right.

Q. What was the difference per hundredweight between the dealer price and the agents price, bearing in mind what I stated about that relationship—per hundredweight?

A. The dealers price was higher.

Q. By how much?

A. I don't recall the exact amount.

Q. About $1 per hundredweight?

A. In certain quantities, yes.

Q. Were those accounts which you classified as dealers and in the Atlantic branch refused to permit to buy direct, in competition with the agents in the resale of these products to painters and consumers?

A. They probably were, yes, in certain cases.

Q. You were intimately associated with the sales problems at those times, were you not?

A. Yes.

Trial Examiner Norwood: We will have a five-minute recess.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. The margins for agents on your agency contracts—have they been the subject of complaints from your
2962 agents as being too low to permit them to make what they consider a reasonable profit?

A. Distributors of white lead have always complained about the margin of profit that they have had.

Q. Is it considered in the trade as generally being a low margin?

A. That is right.

Q. So that one cent per pound on that to a dealer would be an important matter to him as regards his margin of profit in handling it?

A. Well, it all depends on what he sold it for.

Q. Assuming now that he paid your regular prices and sold it for your suggested prices.

A. It would be a close margin of profit.

Q. What would the margin now of a dealer who bought from an agent and resold to a painter at the present time? What would his cent-per-pound margin be?

A. Our list price today is $27 a hundred and I am not so clear as to what our agents' price is. If you have the cards there I could tell. It is $22.50 or something like that.

Q. Approximately 4½ cents per pound margin between—

A. If that is the spread, I am not sure of the agents' prices.

Q. Painters' prices are lower than list prices?

2963 A. Yes, they usually give a discount off that to the painter.

Q. So a dealer buying from an agent and reselling to a painter would have a low margin as compared with the agent buying direct from you and selling to a consumer?

Mr. Ewing: I object to an agent buying direct from us.

Mr. Wright: I will amend that to "acquiring".

Trial Examiner Norwood: Answer the question as amended.

The Witness: Yes, that is correct.

By Mr. Wright:

Q. Do you know whether all branches of the National Lead Company have the same policy with regard to refusing to sell direct to dealers, as the Atlantic branch?

A. I don't know.

Q. How long has it been the policy of the Atlantic branch to refuse to sell direct to dealers?

A. It was our policy during the time of the agency.

Q. The whole time?

A. Of the agency. Since that time, since the agency plan was done away with, we sell direct now to—

Q. Anybody that asks for it?

A. Generally speaking.

Q. Any recognized dealer?

A. Any dealer of fair size.

2964 Q. You said this morning that "We installed the agency system", I believe in 1932. You meant the Atlantic branch?

A. The Atlantic branch; they were the first ones to put it into effect.

Q. That was your own idea, was it?

A. That is correct.

Q. Was that on order of the general offices, or was that a matter of your own discretion?

A. No, I worked up the plan and sold the proposition to the general office.

Q. It was the general office that put—

A. They sanctioned it.

Q. They authorized you to do that?

A. That is correct.

Q. And when the November 15th order putting it into effect came down, that was a general office order to all branches, was it?

Mr. Du Bose: November 15 of what year?

Mr. Wright: 1933.

The Witness: If I remember correctly, I said the latter part of the year. I don't know if it was December or November.

By Mr. Wright:

Q. I think it is established in the record it was the 15th of November, 1933.

2965 Mr. Ewing: Nationwide except for the Pacific Coast branch.

By Mr. Wright:

Q. So that was a general office order. That was not your branch?

A. Oh, no.

Q. So that in your testimony this morning regarding these various matters, you were speaking as the manager of the Atlantic branch rather than the general offices, and

the overall policy of the National Lead Company. Is that correct?

A. I don't quite get the question.

Q. When you were speaking this morning of "we" did this and "we" did that, you were speaking of the Atlantic branch rather than the policy of the general offices of the National Lead Company?

A. That is correct.

Q. That was your policy as manager of the Atlantic branch?

A. That is right.

Q. And you could not speak for the general offices of the company?

A. No, I could not.

Q. What quantity discounts do you now allow on dry white lead in barrels or drums?

A. I am not so familiar with those prices.

Q. I believe it is in the record that at least in 1942 2966 when OPA went on there was one-quarter cent a pound differential for carload purchases of dry white lead. Is that correct?

A. I am not so familiar with those prices. My position has been more with the administrative policy of white lead and so forth during my entire career with the company.

Q. You have had charge of all sales of white lead to paint companies by the Atlantic branch?

A. That is correct, but those details are handled by my assistants.

Q. Do you recall when the one-quarter cent per pound differential on white lead for carload purchases was established?

A. No, sir.

Q. Is the white lead business a dying business, Mr. McNair?

A. I wouldn't say it is a dying business. I think white lead will be in demand for a great many years to come.

Q. Is it recognized as one of the principal pigments for white paint?

A. Dry white lead?

Q. Yes.

A. It is one of the principal ingredients, yes, for good mixed paint.

Q. Is it still recognized as a mark of quality in mixed paint?

A. Yes.

Q. And it still marks the best mixed paint?

2967 A. It still what?

Q. And the best white paint on the market still has a substantial quantity of white lead?

A. In my opinion the more white lead the paint has in it the better quality the paint is.

Q. And do you think that situation will continue in the future?

A. In superior mixed paint, yes, I think so.

Q. I call your attention to a document offered this morning which you identified, Respondents' Exhibit 159, this correspondence back in May and June of 1934.

There are a number of names appearing on the top of 159-A. Can you tell me whose names appear there?

A. Mr. Rowe, R. M. Rowe—he was Assistant Manager of the Atlantic branch.

My name appears on there, and Mr. Hurley—

Q. What was his position?

A. At that particular time he was Sales Manager. And Mr. Zang—he was in the sales department—

Q. Do you know who put that on there? Do you know whose handwriting it is?

A. It looks very much like Mr. Sidford's handwriting. He was the Manager of the Atlantic branch at that particular time.

Q. Who put the interlinings that appear there in

2968 either pen or pencil on those various sheets?

A. I wouldn't know.

Q. I call your attention on 159-B to the name written there, and underscored, in the right-hand margin. Do you know who put that on there?

A. No, I do not.

Q. That was on there when it was found in your files. Is that correct?

A. That is correct, and this is exactly as I found it in my files about ten days ago.

Q. I call your attention on 159-C to the word "new" written in the margin. Do you recognize that?

A. No, sir.

Q. You don't recognize the handwriting?

A. No, sir.

Q. I show you on 159-E the interlining there, "amount? for requirements".

Do you recognize that?

A. No, sir.

Q. I show you now on 159-G "Arrange with Mr. Cavarly for this marking."

Do you know whose handwriting that is?

A. That looks very much like Mr. Sidford's writing.

Q. He was the manager?

A. He was the manager, yes, sir.

2969 Q. Now, I call your attention to the statement appearing in the last paragraph of the letter of June 9, 1934, 159-A, and ask you to read that. Do you recall a confusion over the zone set-up at that time?

A. Well, it was rather a difficult matter to know which points were delivery points and which points were not delivery points. It caused a lot of confusion in that respect.

Q. Apparently under this there were no delivery points. There were flat prices in those states and areas?

A. No, there is a differential there (indicating).

Q. That is for delivery to any point in those states. Is that not the import of that document?

A. I think so.

Q. So there were no delivery points in those states, but customers within them all took the same price. Is that right?

A. I think so.

Q. Do you want to revise your answer then as to the confusion regarding what was the differential and delivery points?

A. This pertains to oxides and dry white lead, as I stated before. I am not too familiar with those particular marketing problems.

Q. What portion of the dollar sales of the Atlantic branch is accounted for by the so-called oxides and dry white, as compared to white lead in oil?

A. Gross margin, you mean?

2970 Q. No, gross sales.

A. Gross sales?

Q. Yes, sir.

A. Dry white lead will be the least important as to the actual dollars and cents. I can't state that. Then litharge would be next to white lead and red lead would be between litharge and dry white lead as to dollars and cents.

Q. And white lead in oil is the most important of your products?

A. In dollar volume.

Q. You see the statement here:

"In the hope it will help simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed."

Q. Do you recall ever receiving those colored maps?

A. I do not.

Q. Were you able to find any such maps in the records?

A. No, sir.

Q. Do you recall what the terms of sale for oxides and litharge and red lead were, as far as differential points or zones, prior to this announcement?

A. I don't recall, no, sir.

Q. Prior to 1934 while you were Sales Manager and Assistant Manager of the Atlantic branch, was it
2971 customary to accept 90-day contracts on card prices from customers for litharge and red lead?

A. I don't recall.

Q. You don't know?

A. No.

Q. Has it been customary in the past for years to accept such contracts?

A. I don't know.

Q. Now, in making your differential quotations on carload purchases of red lead and litharge, has it been customary in the period from 1934 to date to make contracts for carload purchases, based on a differential over the average quotation on pig lead as reported in the American Metal Market and the Engineering and Mining Journal?

A. I don't know whether that has been true or not.

Q. Now, I show you 159-B, the statement in the first paragraph: "The necessary changes in conditions for sale of dry lead were made on January 1st."

Do you recall those changes that were made on that date?

A. I do not, no, sir.

Q. Does that refer to dry white lead? Is that what is customarily referred to as dry white lead?

A. Dry lead, that is dry lead.

Q. I call your attention now to 159-D, the second paragraph, where it states:

2972 "All sellers have agreed to discontinue the old 90-day card price contracts."

Do you recall anything about those?

A. No, sir, I do not.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Redirect?

Mr. Ewing: Inasmuch as I am going to have to recall Mr. McNair on this other document, I would like to reserve what little, if any, redirect I might have until next week, and with that understanding release him at the present time.

Trial Examiner Norwood: That is all right if it is agreeable to Mr. Wright.

Mr. Wright: That is satisfactory.

Trial Examiner Norwood: Very well.

(Witness excused.)

Mr. Ewing: Now, may we have about a two-minute recess?

Trial Examiner Norwood: We will have a five-minute recess.

(Whereupon, a short recess was taken.)

Mr. Ewing: If it suits Your Honor's convenience, I have discussed this with Mr. Wright—I think we would save time tomorrow if we would adjourn now until 10 o'clock and I think we can finish this week's work tomorrow.

2973 Trial Examiner Norwood: Very well. We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Thursday, June 12, 1947.)

2974

Room 332, Federal Trade Commission Building,
Washington, D. C.,
Thursday, June 12, 1947.

Met, pursuant to adjournment, at 10:00 a.m., E.D.S.T.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., and Paul R. Dixon, Esq., appearing for the Federal Trade Commission.

J. T. Weich, Esq. (Davies, Richberg, Beebe, Busick, & Richardson, 815-15th St., N. W., Washington, D. C.), appearing for Sherwin-Williams Company.

Edmund P. Wood, Esq., (2801 Carew Tower, Cincinnati, Ohio), appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq. (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

2975

PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened at 10 o'clock a.m., June 12, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The reporter will note the appearances.

Call your witness, Mr. Ewing.

Mr. Ewing: Mr. McCarthy.

FRED K. McCARTHY was thereupon called as a witness for the respondent National Lead Company, and having been previously duly sworn, testified as follows:

Trial Examiner Norwood: State your full name.

The Witness: Fred K. McCarthy.

Trial Examiner Norwood: You have testified before?

Mr. Ewing: He has testified twice before, when called by the Commission.

Trial Examiner Norwood: It is not necessary to swear him again, I don't believe.

Mr. Wright: I assume the same oath would govern his testimony. If there is any question about it, I would suggest that he be re-sworn.

Trial Examiner Norwood: Proceed.

Direct Examination by Mr. Ewing.

2976 Q. When were you first employed by National Lead?

A. In November, 1935.

Q. And in what capacity were you then employed?

A. As a salesman in the Cincinnati Branch.

Q. I think you testified heretofore that from 1939 to 1943, you were Manager of the Cincinnati Branch of National Lead?

A. That is true.

Q. Since 1943, in what capacity have you worked for National Lead?

A. I have been Manager of Trade Sales in the general office, and Chairman of the White Lead Sales Committee.

Q. And those are both positions in the general office?

A. That is true.

Q. What, in general, were your duties in the Cincinnati Branch from 1935 to 1943?

A. In chronological order, I began as a salesman; became Sales Manager; and then Assistant Manager of the branch; and in 1939, Manager of the Branch.

Q. Now what did your duties as a salesman consist of?

A. Calling on the trade that used the white lead and paint products distributed by the company under the Dutch Boy brand.

Q. Was that limited to the territory of the Cincinnati Branch?

A. Throughout the ten States served by the Cincinnati Branch, yes.

Q. Were those duties limited to the time that you 2977 were a salesman?

A. No, that was when those duties began, but throughout my experience at Cincinnati, I was in contact with our trade and customers in our territory.

Q. Did your duties, both as salesman and later as Manager, require you to travel throughout the territory covered by the branch?

A. Very much of the time I spent traveling.

Q. What contact did you have with customers purchasing white lead-in-oil from your branch?

A. Naturally, in order to be on top of my responsibilities, I endeavored to know most of our key accounts personally, and to know as many of our other customers as I could.

Q. I hand you copies of Commission's Exhibit 582-D and Commission's Exhibit 807-C, and ask you to state whether the map and the chart, those exhibits respectively, correctly portray the territory served by the Cincinnati branch while you were associated with that branch?

A. Yes, sir, they are identical.

Q. Will you tell us how white lead-in-oil was distributed from the Cincinnati branch during the period from 1935 to 1943 when the agency plan was in effect and while you were connected with that branch?

A. Cincinnati was no longer a manufacturing branch of white lead products in that period, and we shipped 2978 to our own account at the various agency points, from the factory at Chicago, throughout our territory, lead on consignment in kegs, and direct to customers in barrels where dry lead was involved, shipping only out of our Cincinnati warehouse and out of our Atlanta warehouse to local drayage deliveries.

Q. Was white lead, dry white lead, sold on consignment during that period?

A. Never.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. At what points throughout the territory of the Cincinnati Branch were agents located, to the extent that you can recall?

A. In most cities of over 5,000 population in each of the ten States.

Q. During the period from 1935 to 1943, while you were connected with the Cincinnati Branch, did you become personally familiar with the competitive problems facing the agents of the National Lead Company located at various points throughout its branch territory?

A. Yes.

Q. From your own personal knowledge, can you state

whether any agent located in a town near or at the
2979 border of any zone served by the Cincinnati Branch was affected, from a competitive standpoint, by the zone differential applicable to the zone in the territory across the line?

Mr. Wright: Would you read that question, please?

(The reporter read the question as follows:

"Q. From your own personal knowledge, can you state whether any agent located in a town near or at the border of any zone served by the Cincinnati Branch was affected, from a competitive standpoint, by the zone differential applicable to the zone in the territory across the line?")

Mr. Wright: I object to that question, Your Honor. It calls for conclusions on the part of this witness as to matters which can be established. There hasn't been a proper groundwork laid here for that question, showing the location of these agents and the competitive situation in any particular respect. Now this can be proved by direct testimony of the parties involved, rather than these broad conclusions.

Mr. Ewing: That isn't what the question called for, Judge. It asked him whether he could state from his own personal knowledge, and it calls for a "yes" or "no" answer—can he state. I am not asking him the ultimate question.

Mr. Wright: Can he state a broad, general conclusion as to competitive effects as between agents within his territory and agents and other competitors without
2980 his territory.

Trial Examiner Norwood: I think that is probably irrelevant, because he wouldn't be permitted to state that knowledge in the way that you elicit it there, inquire about it. He will have to show what factual conditions brought about. You give the facts which indicate what the effects will be. As I understand it, you are going to the effects which this thing would have on different sides of the zone lines. Now we want to get at that in a factual way.

Mr. Ewing: Off the record, if I might.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

I will sustain the objection to the question as it stands now, but this witness may give us the facts of competitive

reaction which came to him in the due course of business, he may do that. He may tell us how the system laid down a given article at a certain price in one town, and at a different price in another, and whether he lost any customers over there or not, and what they did about it—

Mr. Wright: (Interposing.) I take it that Your Honor means to exclude outright hearsay from that statement of what will be permitted.

Trial Examiner Norwood: He may give—

Mr. Ewing: (Interposing.) He can only do it by
2981 customer reaction.

Trial Examiner Norwood: Yes. He may give facts which came to him in the due course of business. He was manager there, managing these salesmen in that territory.

Mr. Wright: He is talking now about a relationship between customers and other people, not about problems encountered by his own salesmen. The question calls for something which can be proved by direct and reliable testimony.

Trial Examiner Norwood: If they quit buying from him and stated the reason why, and that came to him in the due course of business, he may tell us.

Mr. Ewing: And if they didn't quit buying from him, that, of course, is the negative, but it is still a significant factor.

Trial Examiner Norwood: Well, go ahead.

Mr. Ewing: Let's find out what he knows.

By Mr. Ewing:

Q. Does the territory which the Cincinnati Branch sold while you were there, contain so-called par territory?

A. Yes.

Q. Does it also contain so-called 1/8 Zone territory?

A. No.

Q. Is any part of the par territory sold by the Cincinnati Branch contiguous to any 1/8 Zone territory?

A. No.

2982 Q. Is any part of the par territory sold by the Cincinnati Branch contiguous to any ¼ Zone territory?

A. Yes.

Q. Now will you tell us what portion of the par territory sold by the Cincinnati Branch is contiguous to ¼ territory, and at the same time give us the ¼ territory?

A. The zone border of Kentucky and West Virginia was the south edge of our par area adjacent to the northern borders of Tennessee and our section of the State of Virginia, which were, in our territory, ¼-plus territories.

Q. Now along the line dividing those territories, looking at Respondent's Exhibit 157, will you state what cities or towns you see set forth on that map which, on the face of things, would appear to be competitive?

Mr. Wright: Objection, Your Honor. I don't think that that question is proper, a statement "which, on the face of things, seem to be competitive", is a very suggestive statement which calls for a conclusion.

Mr. Ewing: It doesn't call for a conclusion—

Mr. Wright: (Interposing.) Your Honor, I assume that counsel's purpose is to prove that none of these points are competitive, and I object to the characterization, "which appear on their face to be competitive".

Trial Examiner Norwood: You want to know whether these towns were within a competitive distance?

2983 Mr. Ewing: Yes, to look at the map and see if there are towns close together, and then we will find out what he knows about the competitive situation.

Trial Examiner Norwood: Well, he can designate what towns he is referring to. I will overrule the objection, with that explanation.

A. There are no towns along these borders in which we had agencies.

By Mr. Ewing:

Q. You are referring now to the border separating South Kentucky and South West Virginia, and the north border of the State of Tennessee and Western Virginia?

A. That is true.

Q. Now where, to the best of your recollection, did you have agents in Kentucky?

A. In Louisville, Lexington, Ashland, Covington, Newport, Henderson, Owensboro, Madisonville, Bowling Green, Danville, and for a time, I believe, in Hopkinsville.

Q. Where, to the extent that you can recall, did you have agents in Tennessee and Western Virginia which carried the ¼ differential?

A. Nashville, Chattanooga, Knoxville, Johnson City, Kingsport, and Bristol, in Tennessee; and in Virginia at Abingdon and Pulaski.

Q. Now did your branch include a territory carry-
2984 ing a ¾ differential?

A. Yes.

Q. What territory was that?

A. The States of Alabama and Georgia, and our parts of North and South Carolina.

Q. Now the boundary dividing that portion of the Cincinnati Branch territory which carried a ¼ differential, and that portion carrying the ¾ differential, was, then, the southern line of Tennessee and the northern line of Alabama and Georgia, and the eastern line of Tennessee and the western line of North Carolina, is that correct?

A. That is right.

Q. Now will you tell us where, in that portion of North Carolina falling within the Cincinnati branch's territory, you had agents?

A. At Asheville, Shelby, Gastonia,—those are all I recall.

Q. Now I believe you said that your branch territory covered a certain portion of South Carolina, is that correct?

A. That is true.

Q. Will you tell us, to the extent that you can now recall, where, in that portion of South Carolina falling within your branch's territory, you had agents?

A. At Spartanburg, Greenville, and Anderson.

Q. Where, in the State of Georgia, did you have agents?

A. In Rome, Athens, Gainesville, Atlanta, Colum-
2985 bus, Newman, and Decatur.

Q. Where, in the State of Alabama, did you have agents?

A. Birmingham, Montgomery, Dothan, Selma, Anniston, Gadsden, and Florence.

Trial Examiner Norwood: Would Chattanooga and Gadsden take the same rate, get the same price?

The Witness: No, sir, Gadsden would be ¼ over Chattanooga.

By Mr. Ewing:

Q. Now while you were with the Cincinnati Branch, to what classes of customers did your agents sell white lead-in-oil?

A. Mostly to painters, to some dealers, maintenance accounts, local governmental purchasing agencies, and very occasionally to farmers.

Q. You referred to maintenance accounts. Will you tell us what they are?

A. Some small plant might want to paint fire escapes, for example, and would buy a keg of red lead-in-oil.

Q. Of those various classes of customers listed by you, will you tell us which class or classes, if any, bought at list or card price, so-called?

A. A farmer or property owner would pay that price if they ever bought lead-in-oil.

Q. Now while you were with the Cincinnati Branch, both as salesman and as Manager, did you ever receive
2986 complaints from your agents or others purchasing your products, with respect to the differential existing either between par territory and ¼ territory, or between ¼ territory and ⅜ territory?

A. Never.

Mr. Wright: Objection, Your Honor. It is irrelevant.

Trial Examiner Norwood: Objection overruled.

By Mr. Ewing:

Q. Your answer was what?

A. "Never".

Q. Did you ever hear, while you were a salesman or Manager of the Cincinnati Branch, of any restriction upon competition in the branch territory arising out of the existence of the territorial differential?

Mr. Wright: Objection, Your Honor. What this witness ever didn't hear of while he was Manager of the branch is highly irrelevant and immaterial and incompetent.

Trial Examiner Norwood: I think that that is calling for a rather broad conclusion. He may state any facts reported to him that would throw light on these matters, or what his salesmen reported to him.

Mr. Ewing: As you can see from his answer to the preceding question, I am in the difficult position of proving a negative; I can only prove that he never had any complaints, as he has testified, or what he has heard.

2987 Trial Examiner Norwood: I think he can show what he hasn't heard, but I just thought that your question was too broad there, and went to a conclusion.

Mr. Ewing: I will reframe the question so that there will be no question about it.

Trial Examiner Norwood: All right.

By Mr. Ewing:

Q. In the course of your connection with the Cincinnati Branch as Manager, what reports, if any, did you receive from your salesmen or from others, indicating the existence of complaints based upon adverse effect on competition from agents or customers?

Mr. Wright: Objection, Your Honor. That is irrelevant and immaterial, and it is also a very leading question and calls for information which has no place in this record.

Trial Examiner Norwood: I think that you should amend your question by asking if he had heard any complaints of conditions arising out of differences in price.

Mr. Ewing: I will be glad to amend the question to that effect.

Mr. Wright: He has already asked the question if he had any complaints on the territorial differentials, and the witness has said no. That is in the record.

Mr. Ewing: This is from a different source.

Trial Examiner Norwood: I think he may ask this.
2988 I will overrule the objection, with the understanding that the question is amended.

A. There were never any such complaints.

Mr. Wright: Your Honor, I move that that answer be stricken unless there is a proper question to which it is responsive. I don't think counsel has reframed his question in response to Your Honor's suggestion.

Trial Examiner Norwood: He adopted that.

Mr. Wright: To what question was that answer in response?

Trial Examiner Norwood: If the record is not clear on the matter, I will strike it.

Mr. Ewing: I would say that the witness responded to the question as amended; is that correct?

The Witness: Yes.

Mr. Wright: There were two questions, one suggested by Your Honor and one asked by Mr. Ewing.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Ewing:

Q. Mr. McCarthy, in answering the question which has been the subject of discussion, will you state whether you were answering the question as rephrased and amended by Judge Norwood?

A. It was the Judge's phraseology to which my answer applied.

2989 Q. Now you mentioned various classes of customers, and I believe that those that you referred to other than list, were dealers, painters, industrials and certain Government agencies, is that correct?

A. Yes.

Q. And you also mentioned maintenance accounts?

A. That is true.

Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?

A. No.

Q. The question is—can you state?

A. Yes.

Q. Will you state?

Mr. Wright: May I have the first question?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?")

Mr. Wright: I object to that, Your Honor, as calling for a broad general conclusion on the part of this witness, for which no basis has been laid. He is talking about

2990 wide categories of customers here, and it is a conclusion of the witness as to something which could be established by direct evidence; it is self-serving in the extreme.

Mr. Ewing: The question put to the witness called for a statement with respect to his personal knowledge based upon his experience in the business, as to whether, in the course of that experience he had found competition between these two particular classes of customers that I mentioned, namely, industrials and the Government. I think it is competent for him to answer that question if he has that knowledge, and he says he has. If he has, he has.

Trial Examiner Norwood: If, in his experience, he has observed that there is competition between Government and industry in the purchase of white lead—

Mr. Wright (Interposing): The question goes much beyond that. The question goes to the relationship of these

customers with each other, which he could only have gotten second hand—such information. It can only be a conclusion based on hearsay.

Trial Examiner Norwood: He may tell us what his experience has been; he is telling the facts which his experience has developed, which would throw light on whether or not there is such competition. I shall overrule the objection and let him answer the question.

Mr. Wright: Exception.

2991 Trial Examiner Norwood: Give a factual answer; he is not asking you for an opinion, but give a factual answer if you know about this competition.

The Witness: There could hardly have been competition.

Mr. Wright: That, I submit, was not a factual answer; that was a conclusion.

Trial Examiner Norwood: If that is a motion to strike, I will allow your motion.

Mr. Wright: Yes, I move to strike that answer.

The Witness: There was no competition.

Mr. Wright: I move to strike that answer.

Mr. Ewing: That, I submit, is a proper answer because the question is conditioned on his knowledge and experience. In other words the answer to the question in effect is, "Based on my knowledge and experience there was no competition between those classes." That is as far as he can go. He can't go any farther than what his knowledge and experiences shows.

Trial Examiner Norwood: Please read me that original question.

(The reporter read the question as follows:

"Q. Now based upon your experience with the branch, both as salesman and as manager, can you state whether industrial accounts and government accounts, for example, were in competition with each other?")

2992 Trial Examiner Norwood: Whether government accounts and industrial accounts are in competition with each other?

Mr. Ewing: Yes, as far as his experience goes.

Trial Examiner Norwood: I don't know what that question means.

Mr. Wright: When you ruled on my objection, as I understood your ruling it was that he would be permitted to give any evidentiary facts out of his experience which

would deal with that thing, and it wasn't to permit any broad, general conclusion.

Trial Examiner Norwood: I am going to reverse my ruling and sustain the objection to the question originally put, and strike the answers that were subsequently made. I think we should begin now and bring out the facts of this competition, whether any agents sold to one or the other, or whether there was bidding, or just what those facts of competition were.

Mr. Ewing: I am trying to develop the relationship from the competitive standpoint, between the classes of customers that I mentioned. Now—

Trial Examiner Norwood (Interposing): Do the same dealers sell to both classes?

Mr. Ewing: The same dealers may sell to both classes.

Trial Examiner Norwood: That is a factor in this competition, a factual matter.

2993 Mr. Ewing: But that isn't the point here; the point here is that with the industrial customer class getting one price, as I recall it, and the government customer class getting another price, there is no competition between those two classes, so there is no question of discrimination as far as they are concerned.

Trial Examiner Norwood: Why don't you, then, bring out the fact that when the government buys it, it is for consumption, or whatever they use it for, and when the dealer buys it, he is buying it for resale, and show us the competitive situation exactly as it is, instead of getting this man's opinion about a point of law.

Mr. Wright: You Honor, if we are to continue to discuss what counsel is trying to bring out from this witness I suggest that he be excused from the stand.

Trial Examiner Norwood: Well, I want him to understand what we are saying—

Mr. Ewing (Interposing): He isn't a stranger to this case.

Trial Examiner Norwood (Continuing):—about the facts.

Mr. Wright: I will subscribe to that statement.

Trial Examiner Norwood: We will have a five minute recess.

(A short recess was taken.)

2994 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. McCarthy, have you yourself sold, or do you know of sales by agents of the Cincinnati Branch to Government accounts?

A. Yes.

Q. Do you know for what use or uses the purchases were made?

A. The Government account was classified as a wholly tax-supported institution, and such merchandise of our manufacture was consumed for its own maintenance requirements.

Mr. Wright: I object to the answer as not responsive, and move that it be stricken.

Trial Examiner Norwood: He has answered the next question, but I think it may stand if counsel wants it to stand; I think it might as well, to save time. The objection is overruled and the motion denied.

By Mr. Ewing:

Q. Have you, yourself, sold or do you know of sales by agents of the Cincinnati Branch to the so-called industrial accounts—just yes or no?

A. Yes.

Q. What use or uses were made of the products by industrial purchasers?

A. The merchandise was consumed in their own maintenance program.

Q. Now have you yourself sold or do you know of 2995 sales by agents to the so-called painter class of customer?

A. Yes.

Q. Will you tell us what use or uses are made of the product by that class of customer?

A. Our material would be used by the painter in discharging his contract with the property owner.

Q. Have you yourself made, while you were a salesman, or do you know of sales by agents of the Cincinnati Branch, to the so-called dealer class?

A. Yes.

Q. What use or uses of the product would be made by that class?

A. The agents would sell to a dealer for resale purposes.

Q. How far, to the best of your recollection, is it from Chattanooga, Tennessee, to Gadsden, Alabama?

A. Upwards of sixty miles.

Q. During the time you were at the Cincinnati Branch, and since 1943 when you have been Manager of Trade Sales and Chairman of the White Lead Committee—if I recall your testimony correctly—what percentage of the sales of white lead-in-oil of National Lead were made at list price, if you know?

A. An infinitesimal fraction of one per cent.

Q. In the case of sales at list price what would be the type of customer involved?

2996 A. An infrequent buyer such as a property owner or a farmer.

Q. To what use would that class of customer put the product?

A. He might make paint out of the lead or make putty out of the lead, or use it for some purpose having to do with painting or plumbing.

Q. While you have been employed by the National Lead Company have you, yourself, known of any agreement between it and any other company or companies manufacturing white lead-in-oil or dry white lead, relating to the fixing of prices?

A. Never.

Q. I ask you the same question in relation to the fixing of zone or territorial differentials?

A. Never.

Q. I ask you the same question with respect to the restriction of production?

A. Never.

Q. I ask you the same question with respect to the allocation of customers?

A. Never.

Q. I ask you the same question with respect to fixing terms of sale, except as there were provisions in the Lead Industry Supplemental Code relating thereto?

A. Never.

Q. Basing this upon your knowledge as acquired by your experience, where would the so-called dealer

2997 class of customers be generally located?

A. Geographically?

Q. Yes.

A. In smaller towns, suburban areas of big cities, and in sparsely settled communities.

Q. Where, generally, on the same basis, would the painter class be located?

A. Mostly concentrated in metropolitan areas.

Q. I believe last October you testified generally as to how National Lead Company established its prices for white lead. Will you give us the factors taken into consideration by National Lead Company in establishing prices of dry white lead and white lead-in-oil?

Mr. Wright: I object, Your Honor. It hasn't been shown that this witness has had anything to do with the making of the prices at the general offices of the National Lead Company. The question is so broad and general, and it doesn't restrict it as to time.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. I believe last October you testified generally as to how National Lead Company established its prices for white lead. Will you give us the factors taken into consideration by National Lead Company in establishing prices of dry white lead and white lead-in-oil?")

2998 Mr. Ewing: I will add to that—since you have been Manager of Trade Sales and Chairman of the White Lead Sales Committee—if you know.

Mr. Wright: Now Your Honor, it hasn't been established just how prices are made within the organization of the National Lead Company. This witness hasn't been qualified as being able to testify on that matter.

Mr. Ewing: I asked him if he knew what the factors are.

Trial Examiner Norwood: I think he may state what factors he took into consideration respecting anything that he did about it.

Mr. Ewing: I think if he knows the factors the company takes into consideration, he being an official of the general office—if he knows, he surely can so state, and if he doesn't know he can say so.

Trial Examiner Norwood: I will overrule the objection; answer the question.

The Witness: The prices for dry lead would be established by the general office as a result of quite a few different factors—the cost of pig lead, the cost of containers, direct labor in the plants, freight, administrative overhead expense, our own so-called general office expense which encompasses a research laboratory, national advertising,

2999 the general office family, and so forth, and also the competitive situation arising from the current prices of other pigments such as leaded zinc, zinc oxide,

titanium and other pigments with which we are in competition in our efforts to sell dry white lead to paint grinders, potteries, and other industrial consumers.

By Mr. Ewing:

Q. Would the price of ready-mixed paint be any factor?

A. Not to much of an effect on our pricing of dry white lead because in that—

Q. (Interposing): No; no—give us the factors in connection with white lead-in-oil?

A. The cost of pig lead, the cost of linseed oil, mineral spirits, containers, production costs from the factory side, labor rates and so forth; our own overhead, as previously mentioned, and primarily the existing price structure of competitive prepared paints and other factors of competition.

Q. To whom, or to what class or classes of customers is dry white lead sold generally?

A. Paint grinders and potteries, primarily.

Q. To what class or classes of customers is dry red lead sold generally?

A. The manufacturers of paint, varnish, storage batteries, ceramics—they account for the bulk of dry red lead consumption.

Q. To what class or classes of customers does Na-
3000 tional Lead Company sell red lead in oil?

A. Railroads, steamships, industrial accounts, governmental agencies, and a minor percent to the painting trade.

Q. To what class or classes of customers does National Lead sell litharge?

A. Mostly to the manufacturers of storage batteries, producers of dry colors, varnish makers, and a small amount to paint grinders; also insecticide manufacturers use litharge.

Q. Now a little while ago you mentioned certain competitive pigments. Does National Lead produce any zinc oxide?

A. No sir.

Q. Does it produce any leaded zinc oxides?

A. No sir.

Q. Does it produce any lithopone?

A. No sir.

Q. Does it, either directly or through any subsidiary, produce any titanium oxide?

A. Yes, that we do.

Q. When a sale of white lead-in-oil is made direct to a customer, or was made direct to a customer by the National Lead Company, or one of its branches, as compared with a sale to a customer by one of its agents during the period the agency plan was in effect, was the same price paid in either event by that customer?

A. To the same class of customer, yes.

3001 Trial Examiner Norwood: Read that question and answer for me, please sir?

(The reporter read the record as requested.)

By Mr. Ewing:

Q. Mr. McCarthy, did you know a Mr. Lester Wilson?

A. Yes.

Q. What position with National Lead Company did he hold in 1937, if you know?

A. He was Chairman of the Metal Sales Committee, and Manager of Metal Sales.

Q. Do you know Mr. Joseph Martino?

A. Yes.

Q. Was he connected with the company in 1937?

A. Yes, as Assistant Comptroller and Secretary of the Metal Sales Committee.

Mr. Ewing: No further examination.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. McCarthy, I take it that you are thoroughly familiar with all the customers that were sold by the Cincinnati Branch in that branch territory over the period with which you were connected there?

A. All of the key accounts and most of the others, yes sir.

Q. And were familiar with the competitive rela-

3002 tionships that existed between those various customers?

A. Yes.

Q. Do you recall having any conferences several years ago with Mr. Carl Depue of the Federal Trade Commission?

A. Mr. Depue, yes, sir.

Q. Isn't it correct that you cooperated with him in fur-

nishing the records for a tabulation of invoices which was made up?

A. That is true.

Q. Do you recall obtaining from the various branch offices of the National Lead Company certain information regarding their accounts, which you turned over to Mr. Depue?

A. Yes.

Q. Do you recall obtaining for Mr. Depue from the branch offices lists of all accounts within those branches?

A. We got so much material for Mr. Depue that I don't recall the individual pieces.

Mr. Wright: I would like to have the reporter mark this document as Commission's Exhibit 858-A to -F, inclusive, for identification.

Trial Examiner Norwood: It may be so marked.

(The document referred to was marked Commission's Exhibit 858-A through -F, inclusive, for identification.)

By Mr. Wright:

Q. Now Mr. McCarthy, when you were listing those accounts which were close to the borders of the dif-
3003 ferential zones of the Cincinnati territory, did you mean to list all of the accounts who were agents?

A. Those that I recall.

Q. Just those that you recall?

A. Yes.

Q. So there may very well have been a number of others along that line which you omitted?

A. There could have been.

Q. I show you a document, Commission's Exhibit 858-A through -F, and ask you if you recognize that document?

A. Frankly I don't recall having seen this before.

Q. Do you recognize that as a list of all the accounts of the Cincinnati Branch during the period designated?

A. Yes, these are all customers of the Cincinnati Branch.

Q. You don't recall that that document was supplied by you to Mr. Depue as a list of all those accounts?

A. It must have been.

Mr. Wright: Your Honor, I would like to interrupt the cross-examination of this witness now to obtain further identification of this document by another witness. I hesitate to do this but in view of the witness' failure to recognize this document I have no alternative.

Mr. DuBose: May we go off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

3004 Trial Examiner Norwood: On the record.

Mr. Ewing: I will stipulate that we supplied that.

Mr. Wright: In other words I understand that the stipulation is that Commission's Exhibit 858-A through -F is a document which was supplied by the National Lead Company?

Mr. Ewing: That is right.

Mr. Wright: I offer Commission's Exhibit 858-A through -F in evidence, as a document supplied by the National Lead Company setting forth as to the Cincinnati Branch, all customers to whom they sold white lead, dry or in oil, during the period from January 1 to March 31, 1943, with symbols as explained thereon.

Mr. Ewing: No objection.

Trial Examiner Norwood: Received.

(The document heretofore marked COMMISSION'S EXHIBIT 858-A through -F, for identification, was received in evidence.)

By Mr. Wright:

Q. Mr. McCarthy, during the period of the agency plan what was the differential between the dealer and the agent on white lead-in-oil?

Mr. DuBose: I object to that question. I don't think the word "differential" is the correct way to term the net which the agent received. It implies that there is a price, in other words.

3005 Mr. Wright: Your Honor, this witness was manager of that Branch and is the Manager of Trade Sales and knows exactly what I am talking about, and is thoroughly competent to answer that question, and any question he doesn't understand he can say so.

Mr. DuBose: I am sure we all know what this question relates to, but the record ought to be clear.

Trial Examiner Norwood: I don't think the word as used has such an implication.

Mr. Wright: I still urge that I have the right to use any terms in describing this on cross-examination, as I wish, as long as I don't try to trap the witness.

Trial Examiner Norwood: I don't know that that is the general rule, but at any rate I will overrule the objection

and ask the witness to answer the question. Do you want it read?

The Witness: No sir. During the last few years of the existence of the agency plan there normally obtained about a dollar between the agent's cost and the dealer's price.

By Mr. Wright:

Q. That is a dollar per hundredweight?

A. Yes.

Q. Do you know whether the accounts which were classified as dealer accounts were in competition with your agents in reselling these products?

3006 A. There could have been instances of that nature.

Q. Do you know that there were instances of that nature?

A. Not definitely, no sir.

Q. Well, now, what were a man's qualifications in order to obtain lead at the dealer's price; what business did he have to be engaged in?

A. We had no contact with that type of trade; I wouldn't know.

Q. Well, now, you sold to dealer accounts when you were in the Cincinnati Branch, did you not?

A. No sir, we didn't sell to dealers.

Q. I call your attention to the fact that on this document here, Commission's Exhibit 858-A through -F that the symbol "D" refers to Dealers, and to the fact that there are accounts listed here designated as "D" for dealer and "A" for Agent. Now on Commission's Exhibit 858-B, for instance, in Peru, Indiana, there is the Jones Hardware Company with the symbol "D" alongside—presumably a dealer account—and Wellers Paint & W. P. Co., with the symbol "A" alongside, or an agent's account.

A. You are right.

Q. That would indicate, would it not, that there were sales direct to that class of accounts, at least during the period which this document covers?

A. You are correct; I am in error.

3007 Q. I call your attention to Exhibit 858-C, and to the Loeb Hdwe. Co., Montgomery, Alabama, with the designation "D" for Dealer alongside; and the G. W. Barnett Hdwe. Co., the Pittsburgh Plate Glass Co., and Teague Hdwe., all in Montgomery, Alabama, and all with the desig-

nation "A" for Agent, alongside. Is it not a fair assumption that the Loeb Hardware Company was engaged in a similar enterprise as those other accounts in that territory?

A. Yes sir.

Q. In other words, then, is it not fair to state that the dealers were primarily engaged in the resale of those products?

A. Yes sir.

Q. Were the agents also engaged in the sale of those products to similar classes of customers?

A. Yes.

Q. Would it not be fair, then, to state, that they were in competition with each other?

A. That could have been.

Q. Now as manager of the Cincinnati Branch you sold all products of the National Lead Company in that area, is that correct?

A. Yes.

Q. You sold litharge and red lead to the battery manufacturers?

A. Yes.

3008 Q. Did you also sell litharge and red lead in hundred pound and smaller kegs?

A. Yes.

Q. Were those products in those kegs sold to the dealer trade for resale generally?

A. Yes, they were.

Q. And they took the white lead-in-oil selling schedule, did they not?

A. No, they were priced on another schedule.

Q. On what schedule were they priced?

A. Just what do you mean by "schedule", Mr. Wright?

Q. I mean zone and territorial differentials, and the differentials as between the various sizes of kegs.

A. The package differentials were the same as for lead-in-oil, and the geographical zone differentials were identical.

Q. That is what I meant. Now from what factories or plants did the red lead and litharge sold by the Cincinnati Branch originate?

A. We would ship the western part from St. Louis, and the eastern part from Philadelphia.

Q. How about the Atlanta territory, the Atlanta plant?

A. That would come from St. Louis.

Q. Doesn't the company have a plant producing red lead and litharge in Atlanta, Georgia?

A. No, the Atlanta oxide plant makes only one
3009 grade of battery litharge, with no red lead facilities and no facilities for other than this battery litharge.

Q. Do they make just one grade of battery litharge?

A. At the time I left there they had two types of a similar product for battery manufacturers only.

Q. What types have they made since you left there? You left there in 1939, was it not?

A. No, in 1943. I understand that they now make one or two other grades of the same battery litharge, but they still do not make red lead.

Q. How about the keg red lead and litharge, where did that originate?

A. From either St. Louis or Philadelphia.

Q. Where did you have warehouses in the Cincinnati Branch territory?

A. At Cincinnati and at Atlanta.

Q. Those were the only two warehouses?

A. That is right.

Q. And your dry white lead came from Chicago?

A. And St. Louis.

Q. And St. Louis?

A. Right.

Q. And your white lead in-oil came from Chicago?

A. Chicago.

Q. You stated a while back that an infinitesimal
3010 fraction of sales were at list price while you were manager at Cincinnati?

A. That is correct.

Q. You meant by the company itself?

A. And to my knowledge by our agents.

Q. But you don't know for sure the price at which they sold?

A. No.

Q. The only information you received from them was the amount that they sold and a remittance of all but what they kept as their compensation?

A. That is true.

Q. Did you ever receive complaints from any of the trade in your district regarding the narrow margin for the dealers and agents on white lead-in-oil?

A. It was a subject of discussion; because of the character of the product it was a narrow margin item.

Q. Did you receive complaints that the margin was too low?

A. Occasionally they would remark on the narrow margin at which they had to operate.

Q. What were these discussions that you referred to?

A. Well, we countered by showing them that it was a compact inventory and a fast turnover, so that at the end of the year their net compared very favorably with other slower moving, longer margin items.

Q. Did you receive such complaints principally from your agents?

3011 A. Yes.

Q. Mr. McCarthy, what have you had to do with the general policy of the National Lead Company in fixing and setting its prices and its price policies?

A. Every time a price has been changed since I have been in New York I have been in on the decision.

Q. That is, since 1943?

A. Yes sir.

Q. Then your answer as to the factors that entered into the price making didn't go back of 1943?

A. No sir.

Q. When a major change in pricing is made by the National Lead Company what are the mechanics for discussing that and finally deciding it within the organization?

A. Those immediately concerned with the decision would get all of the available material for basing such a decision, together, go over it in detail, consult with some of the people from the branches on occasion, and then announce by bulletin to the various branches what the new basis would be.

Q. Who has the authority to make the final decision and determine that you are going to do it?

A. Mr. Harold Rowe.

Q. He is the Vice President in charge of that aspect of the matter?

A. That is right.

3012 Q. In other words it is a higher level decision in the company organization, is it not?

A. The final decision, yes, sir.

Q. Is that ever acted on by the Board of Directors?

A. Not to my knowledge.

Q. Who below Mr. Rowe are immediately concerned with such decisions; does the White Lead-in-Oil Committee function as a committee to assess the factors involved?

A. No, not as a committee. Mr. Rowe and myself, our comptroller and one or two other general office officials would be in on such a decision.

Q. The comptroller would also be in on that decision?

A. Yes.

Mr. Wright: No further cross-examination.

Mr. Ewing: That is all, Mr. McCarthy.

Trial Examiner Norwood: Thank you, Mr. McCarthy.

(Witness excused)

Mr. Ewing: Might we have a short recess? I have some papers that the next witness is going to use and I think we could save some time if I talked to Mr. Wright about them to see if we might reach an accord on how we shall handle them.

Trial Examiner Norwood: All right, a five minute recess.

(A short recess was taken.)

3013 Trial Examiner Norwood: The hearing will come to order. At the request of counsel we will recess until two o'clock.

(Whereupon, at 12 noon, a recess was taken until 2:00 p. m., this day.)

3014 After Session.

2:00 p. m.

Trial Examiner Norwood: Come to order, gentlemen.

Mr. Ewing: Mr. Examiner, may I have these exhibits marked for identification as Respondents' Exhibit 160-A to -R, inclusive; 161; 162-A to -D, inclusive; 163-A to -G, inclusive; 164; 165-A to -O, inclusive; 166-A and -B?

Trial Examiner Norwood: They may be so marked.

(The papers referred to were marked Respondents' Exhibits 160-A thru 160-R; 161; 162-A thru 162-D; 163-A thru 163-G; 164; 165-A thru 165-O; 166-A and 166-B, for identification.)

J. R. HIGGINS was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Higgins, will you state for the record your full name and address?

A. J. R. Higgins, 345 Fairlawn, Webster Groves, Missouri—that is St. Louis County.

Q. By whom are you employed, Mr. Higgins?

A. National Lead Company.

Q. In what capacity?

3015 A. At the present time, Assistant Manager.

Q. When were you first employed by National Lead?

A. 1911 through a subsidiary company.

Q. That is the St. Louis branch of the National Lead?

A. St. Louis branch.

Q. In the course of your employment have you had anything to do with the sales of any of the products of the St. Louis branch of the National Lead Company?

A. Yes. In 1939— In 1929 I was made Assistant Comptroller and Sales Manager of the White Lead and Oxide Sales.

Q. And from that time on—

A. Later, in 1939, I was made Assistant Manager.

Q. From 1929 on you have had experience with sales of white lead-in-oil and oxide?

A. I have.
Q. How about dry white lead.
A. That is also included.
Q. Since 1929?
A. Yes.
Q. Mr. Higgins, I show you documents marked Respondents' Exhibit 160-A to -R, inclusive, for identification, and I ask you what those documents are.
A. These records are 1941 sales of heavy and soft paste white lead-in-oil.
Q. Who prepared those documents?
3016 A. The documents were prepared under my direction.
Q. As a result of what request were these documents prepared?
A. We had a request from our national office for the sales record of 1941, as I recall it.
Q. And as a result of that request these documents were prepared under your supervision?
A. That is correct.
Q. When were these documents prepared?
A. I would say in April of 1947.
Q. Is this date of any significance (indicating to witness)?
A. That is April 5, 1947.
Q. Now, take Respondents' Exhibit 160-A for identification. Will you tell us what those figures are under each heading beginning with the left-hand column?
A. This is a summary of the work sheets. The first column shows the zone, the second column shows the total of pounds sold, the third column the total freight and cartage, and the final column average freight per hundredweight.
Q. Per hundred pounds?
A. Per hundred pounds.
Q. And that covers, does it not, white lead-in-oil for 1941?
A. The first bracket covers white lead-in-oil for 1941?
Q. And those represent figures showing sales of the St. Louis branch of the National Lead Company?
3017 A. That is correct.
Q. Of that product for 1941?
A. That is correct.
Q. Now, coming to the item number 2 or second bracket, will you tell us what is represented there?

A. That is 1941 sales of dry white lead.

Q. Going back to the first bracket, these purport to be the total pounds sold of white lead-in-oil for the respective zones there indicated?

A. That is correct.

Q. And the same is true as to the freight and cartage by zones?

A. That is correct.

Q. And the average freight per hundredweight?

A. That is correct.

Q. The second line under item 2—will you tell us what that represents?

A. Under dry white lead we have a par classification which covers certain territory. It gives the total pounds, total freight and cartage, and the average cost per hundred pounds.

Q. Will you take the words "plus one quarter cent" and tell us what that purports to represent?

A. "Plus one quarter cent" is the differential that is added in certain territory, and it covers the total of 3018 white lead pounds sold into those territories, the total amount of the freight and cartage and the cost per hundred pounds.

Q. All of these figures represent, do they not, sales by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. Under item number 3, will you tell us what is listed there?

A. That is the 1941 sales of oxides in carload lots.

Q. Will you take the words and figures appearing on the two lines below the heading?

A. We have a car territory. That covers the total pounds, total freight, cost per hundred pounds.

Q. Does that total freight also include cartage?

A. It includes cartage, and I should have said total freight and cartage.

Trial Examiner Norwood: Cost per hundred pounds—do you mean cost to the customer?

The Witness: Cost per hundred pounds, the freight charges.

The next line is the differential 25 cents, one-quarter, covering the total pounds, total freight and cartage, and the cost per hundred pounds.

By Mr. DuBose:

Q. Now, let's take item 2. The par and plus one-
3019 quarter cent apply to the zones for dry white lead. Is that true?

A. That is correct.

Q. Item number 3 represents the zones for oxides in carload lots?

A. That is correct.

Q. And the figures applicable thereto?

A. That is correct.

Q. Will you tell us what item number 4 is?

A. 1941 sales of oxides in carload lots.

Q. Should that be carload or less than carload?

A. I would have to see these sheets a moment. Item number 4 includes the differential of one-quarter territory.

Q. What I am asking you about, Mr. Higgins, is the heading here. There apparently are two headings; one, item number 3 purports to be 1941 sales of oxides in carload lots and item number 4 also states 1941 sales of oxides in carload lots.

3020 Should that not be less-than-carload lots?

A. No, the first is carload. The word "car" should be added here (indicating), and the words "one-quarter differential" added here (indicating), and then you have the classifications.

Q. In other words, this represents car sales. What is the "plus one-quarter cent" on item 3?

A. That is under the differential territory of one-quarter of a cent.

Q. Will you go to Respondents' Exhibit No. 163-G, for identification, and tell us what that is?

A. That is the differential for the one-half cent territory.

Q. For what size lots?

A. L. c. l. lots. There was no carload classification.

Q. I show you Respondents' Exhibit 164, for identification, and I call your attention to the heading under the last item—

Mr. Wright: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. Do you notice the heading under the last heading on Respondents' Exhibit 164, for identification?

A. Yes.

Q. Do you notice the heading under item 4 on Respondents' Exhibit 160-A, for identification?

A. Yes.

Q. Is that a correct heading?

3021 A. The headings should be "Carload Lots" and "Less-than-carload Lots" separated.

Q. In other words, item No. 4 should be "1941 Sales of Oxides in Less-than-carload Lots"?

A. That is correct.

Q. Instead of "Carload Lots", as is there stated?

A. That is correct.

Q. I show you Respondents' Exhibit 160-B, for identification, and ask you what that purports to show?

A. These are actual figures on cartage which we were able to determine from our records.

Q. When you say "actual figures on cartage," do you mean the cartage expense to National Lead Company?

A. Yes, to the National Lead Company at what we call warehouse points.

Q. What does that represent, National Lead's own trucking expense, or what they had to pay to outside trucking companies, if you know?

A. That is both, St. Louis truckage and outside trucking companies. Warehouses do not have delivery trucks.

Q. And these figures are taken from the books of the St. Louis branch of the National Lead Company?

A. That is correct, they are exact figures.

Q. Showing the cartage expense to National Lead Company, St. Louis branch, for the year 1941?

3022 A. That is correct.

Q. In connection with the warehouses at the points indicated on this exhibit?

A. That is correct.

Q. For the products white lead-in-oil, dry white lead, and oxide. Is that correct?

A. That is correct.

Q. Is Respondents' Exhibit 160-B, for identification, a summary of the material in Respondents' Exhibit 160-C, for identification?

A. That is correct.

Q. Now, take Respondents' Exhibit 160-D, for identification. What does that purport to show?

A. This is the differential par territory. It covers a

list of towns in Illinois and Missouri, which are classified under par territory.

The first column represents where shipped from—in all cases St. Louis.

The second column is the freight rate from St. Louis according to the 1941 tariff which we had in our possession.

Q. That is under the numeral "4" on this page, Respondents' Exhibit 160-D, for identification?

A. That is correct.

Q. Do you know what that freight rate is, listed under item No. 4?

3023 A. That is the freight in the case of the first item, to Aledo, Ill., from St. Louis, 42 cents per hundred pounds.

Q. That is the freight rate which you obtained from someone in the National Lead Company's St. Louis branch?

A. We obtained that from our traffic department.

Q. You have a traffic department in that branch?

A. We have a traffic department at St. Louis.

Q. And they obtained their figures from the 1941 tariff books?

A. That is correct.

Q. Now, take the figures appearing under the heading "6," and beneath that the word "tonnage." Will you tell us what those figures are and where you obtained them?

A. The tonnage shown in column No. 6 is the actual tonnage which was sold in these various towns during the year of 1941.

Q. What product is involved?

A. Covering white lead-in-oil.

Q. Upon what records in the St. Louis branch of the National Lead Company are those figures based? What records are they taken from?

A. We have a card system which I believe I stated back some years ago, back in 1929 and 1930, in order to get a better analysis of the sales of our product.

We formerly kept it in just a few cities. My object at that time was to get a classification and find out
3024 where our tonnage material was going.

They apparently carried it along on a card system and some years later the plan was changed from the towns to the counties. We changed our sales plan because we divided some States for the salesmen, and the salesmen worked according to counties.

Q. Take the year 1941. Were those cards based upon tonnage sold to cities rather than by counties?

A. That is correct.

Q. How were those cards made up, that is, the cards from which these tonnage figures were taken?

A. That was made up by our statistical or auditing department. Fortunately they had these records.

Q. What were the mechanics of that; how did that work; where did they get the material to put on the cards, themselves?

A. At the time the invoices came through from the billing department they went to the Cardex department, and the girl took an actual record of the tonnage and so indicated on the card which she used, by punching the card at a certain notch on a machine devised for that purpose.

Q. Take Respondents' Exhibit 160-D, for identification, the towns listed under the heading "Illinois." Are those all the towns to which deliveries of white lead-in-oil were made by the St. Louis branch of National Lead Company for the year 1941?

A. That is correct.

Q. Going back to the first line opposite the town 3025 Aledo—that shows that the shipment came from St. Louis?

A. That is correct.

Q. That the freight under column 4 from the warehouse was 42 cents—that is from St. Louis to Aledo?

A. That is correct.

Q. And column No. 5 the applicable rate was listed as 42 cents?

A. That is correct.

Q. Then the figures 6,050 represents pounds. Is that it?

A. Pounds is correct.

Q. Which represents the total poundage sold to customers in Aledo during the year 1941 by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. And under column No. 7 "Applicable Freight," that is how the figure was arrived at?

A. That is the sum total of 6,000 pounds times the rate of 42, or $25.50.

Q. 6,050 pounds?

A. That is correct.

Q. For the rest of that page, the information opposite each of the cities is similar?

A. That is correct.

Q. The freight rates were obtained from the traffic department?

3026 A. That is correct.

Q. And the total pounds sold to customers located in these towns was obtained from your card system as to which you have just testified?

A. That is correct.

Q. Under the heading "Illinois" opposite the town "Decatur," will you tell us what the letters and figures "TL 22, LCL 32" represent?

A. L. c. l. represents the less-carload rate.

Q. Which is 32 cents?

A. Thirty-two cents.

Q. Per hundred pounds?

A. Per hundred pounds.

Q. What is the "TL"?

A. That is the truckload.

Q. That is 22 cents per hundred pounds?

A. Twenty-two cents per hundred pounds.

Q. In other words, that "TL 22" means that the truckload rate from St. Louis to Decatur, Ill., is 22 cents per hundred pounds. Is that correct?

A. That is correct.

Q. And that the less-than-carload rail tariff from St. Louis to Decatur, Ill., is 32 cents per hundred pounds?

A. That is correct.

Q. Respondents' Exhibit 160-D represents the en-

3027 tire tonnage or pounds of white lead-in-oil sold by the St. Louis branch from 1941 for the par territory?

A. That is correct.

Q. And at the bottom there is a summary, is there not?

A. That is correct.

Q. What does the figure 2,560,244, near the bottom of this page, Respondents' Exhibit 160-D, for identification, represent?

A. That represents the total figure of white lead-in-oil in pounds in the par territory.

Q. Sold by the St. Louis branch?

A. Sold by the St. Louis branch.

Q. In 1941?
A. In 1941.
Q. Right opposite that figure is the figure 584801. What is that figure?
A. That is the total of the freight charges according to the classification set down there.
Q. What is that? What does that figure mean? Is it $5,848.01?
A. That is correct.
Q. Beneath that are the words "plus cartage in St. Louis." What is the sum opposite those words?
A. $1,334.24.
Q. The total of $7,182.25 is a simple addition of those two figures immediately preceding?
3028 A. That is correct.
Q. What is this figure here "less $1,782.18"?
A. We had to separate that because this was in Missouri and that was in Illinois, and in order to get it straight we had to deduct the $1,782.18 from that.
Q. That represents the deduction for cartage in Missouri?
A. That is correct.
Q. And the total figure of cartage in St. Louis, $1,334.24, is the figure which appears under the heading "St. Louis" on Respondents' Exhibit 160-B, for identification?
A. That is correct.
Q. Now, will you tell us what Respondents' Exhibit 160-E, for identification, purports to represent?
A. That represents the differential territorial of one-eighth of a cent.
Q. Does that show sales, in other words, by the St. Louis branch of the National Lead Company for 1941 in the one-eighth differential territory?
A. That is correct.
Q. That and the continuing pages?
A. That is correct.
Q. Now, is the information on this page, Respondents' Exhibit 160-E, for identification, prepared in similar fashion and from similar records as were the figures on Respondents' Exhibit 160-D, for identification?
3029 A. That is correct.
Q. Respondents' Exhibit 160-F is a continuation of the one-eighth differential territory sales?
A. That is correct.

Q. As is Respondents' Exhibit 160-G, for identification?
A. That is correct.
Q. Now, will you tell us what Respondents' Exhibit 160-H through K, inclusive, represents?
A. That is one-quarter differential for white lead-in-oil, St. Louis branch, 1941.
Q. In other words, that shows the white lead-in-oil sales by the St. Louis branch of National Lead Company for the year 1941 in that particular territory?
A. That is correct.
Q. Was the information on these sheets prepared in similar fashion and from similar records as were the others that you testified about?
A. That is correct.
Q. I don't know whether you have told us this. On these pages throughout Respondents' Exhibit 160-A to R, for identification, under the numeral or column numbered 1, are the words "shipped from" and then entries thereunder. What do those entries represent?
A. In that case it represents the Kansas City warehouse.
Q. In other words, you there set forth the ware-
3030 house from which goods sold to these particular towns were shipped?
A. That is correct.
Q. Will you tell us what the material on Respondents' Exhibit 160-L and M represents?
A. That represents the territory under the three-eighths differential, white lead-in-oil, St. Louis branch, 1941.
Q. Also sales by the National Lead Company, St. Louis branch?
A. Yes.
Q. That year?
A. Yes.
Q. In that territory?
A. That is correct.
Q. And the material appearing on those pages was prepared in similar fashion as the other page as to which you have testified?
A. That is correct.
Q. Now, Respondents' Exhibit 160-N and O represents what?
A. That is the territory covered under the one-half cent differential, National Lead Company, St. Louis branch, white lead-in-oil, year 1941.

Q. And those figures were prepared in similar fashion from similar records?

A. That is correct.

Q. What does Respondents' Exhibit 160-P and Q represent?

A. That represents the territory covered by the
3031 three-quarters cent differential, National Lead Company, St. Louis branch, white lead-in-oil, for the year 1941.

Q. Sales to customers in that territory?

A. That is correct.

Q. Now, take the item "Athens, Texas," on Respondents' Exhibit 160-P, for identification, under column No. 1, and "Dallas."

A. That shows the shipment originated from Dallas. Material was shipped out of the Dallas warehouse.

Q. The material was shipped initially from St. Louis to the Dallas warehouse?

A. That is correct.

Q. And under column No. 2 is the figure "48." What does that represent?

A. That represents the commodity rate, carload, from St. Louis to Dallas.

Q. Forty-eight cents a hundred pounds?

A. That is correct.

Q. And under column 4 the figure "36" represents what?

A. That represents the l. c. l. rate, all-rail, from Dallas to Athens, Texas.

Q. And under column No. 5 the figure "84" represents what?

A. That is the sum total of the carload rate of 48 plus 36 cents l. c. l. rate to point of destination.

Q. Per hundred pounds?

A. Per hundred pounds.

3032 Q. In other words, Mr. Higgins, this Respondents' Exhibit 160-A to R, inclusive, for identification, shows in the case of a shipment from a warehouse located at a point other than St. Louis, the freight from St. Louis to the warehouse and the applicable freight rate from the warehouse to the particular city or town?

A. That is correct.

Q. I show you Respondents' Exhibit 160-R, for identification, and ask you what that represents?

A. That represents the differential territory one cent.
Q. Does that represent sales by National Lead?
A. Sales by National Lead Company, St. Louis branch, white lead-in-oil, towns under that list for the year 1941.
Q. I show you document marked Respondents' Exhibit 161, for identification, and ask you what that represents?
A. This represents the 1941 sales of white lead-in-oil for the St. Louis branch of tne Nationl Lead Company classified according to the States and then broken down into the various differentials, par, one-eighth, one-fourth, three-eighths, and so on.
Trial Examiner Norwood: Off the record.
(Discussion off the record.)

By Mr. D. Bose:

Q. And this shows pounds?
A. Total pounds in each differential.
3033 Q. I show you documents marked Respondents' Exhibit 162-A to D, inclusive and ask you to state what they represent?
A. These pages represent dry white lead sales in all States in the St. Louis branch under par territory with the exception of from Colorado, New Mexico, and Wyoming.
Q. And those three States are not in the par territory, are they?
A. That is correct.
Q. Those are sales for what year
A. Dry white lead for the year 1941.
Q. Are they listed by cities in each particular State?
A. These are listed by States.
Q. Those are by States?
A. Yes, and we have also the cities.
Q. Does that purport to show all of the sales of dry white lead by the St. Louis branch, by cities, for the year 1941?
A. That is correct.
Q. In the par territory?
A. That is correct.
Q. And the information contained on these documents marked Respondents' Exhibit 162-A to D, for identification, was prepared in similar fashion and from similar records as the information contained in Respondents' Exhibit 160-A to R, inclusive, for identification?
A. That is correct.

3034 Q. Now, in case of shipments from warehouses other than St. Louis, these documents, Respondents' Exhibit 16-A to D, inclusive, for identification, show the carload rates from St. Louis to the particular warehouse from which the shipments were actually made?

A. That is correct.

Q. And in that latter situation they show also the freight from the warehouse to the town in which the coustomer is located?

A. That is correct.

Q. And the applicable freight rate is either the freight rate directly from St. Louis to the towns mentioned or the total of the freight rate from St. Louis to the warehouse plus the freight from the warehouse to this particular city. Is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 163-A to D, inclusive, and ask you what these documents represent?

A. These represent the sales of oxides in carload lots in par territory, according to States and the towns shown as the point of destination.

Q. And those are, in other words, sales by the St. Louis branch of National Lead Company of oxides in carload lots for the year 1941?

A. That is correct.

3035 Q. To the customers in par territory?

A. That is correct.

Q. Were the figures which appear on these sheets, Respondents' Exhibit 163-A to D, inclusive, for identification, prepared in similar fashion?

A. That is correct.

Q. Respondents' Exhibit 163-C and D represents sales of oxides by the St. Louis branch of National Lead Company in less-than-carload lots for the year 1941?

A. That is correct.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. I show you Respondents' Exhibit 163-E, for identification, and I ask you what that represents?

A. That represents sales of oxides, National Lead Company, St. Louis branch, to differential territory one-quarter of a cent, according to the States and towns listed.

Q. In what lots or sizes?

A. In carload lots.

Q. Is it correct to say that Respondents' Exhibit 163-F, for identification, represents similar information as to sales of the St. Louis branch, National Lead Company, of oxides in less-than-carload lots?

A. That is correct.

3036 Q. I show you Respondents' Exhibit 163-G, for identification, and I ask you what that represents?

A. That represents the sales of oxides, National Lead Company, St. Louis branch, under differential territory one-half cent, according to the States listed for the year 1941.

Q. Did you say in what lots these sales were?

A. Less-than-carload lots.

Q. Now, Mr. Higgins, all of the information which appears on this series of documents marked Respondents' Exhibit 163-A to G, inclusive, for identification, was prepared in similar fashion and from similar records, as were these statistics and figures set forth in Respondents' Exhibit 160-A to R, inclusive for identification?

A. That is correct.

Q. I show you Respondents' Exhibit 164, for identification, and ask you what that represents?

A. This is the 1941 sales data which is the result of the work sheet and covers 1941 sales of heavy and soft paste white lead-in-oil, 1941 sales of dry white lead, 1941 sales of oxides in carload lots, 1941 sales of oxides in less-than-carload lots.

Q. Is it correct to say that that document, Respondents' Exhibit 164, for identification, contains the information appearing on Respondents' Exhibit 160-A, for identification?

A. That is correct.

3037 Q. I believe you stated that Respondents' Exhibit 160-A, for identification, is a general summary of the material set forth in Respondents' Exhibit 160-B through Respondents' Exhibit 163-G, these other documents as to which you just testified?

A. That is correct.

Q. Now, Mr. Higgins, I believe you stated that the tonnage or pound figures showing the sales of white lead-in-oil, dry white lead, and oxides which appear on these exhibits you have just identified, were taken from certain cards kept in the St. Louis branch of the National Lead Company?

A. That is correct.

Q. Did you tell us where the information on those cards was obtained from?

A. The records were obtained from cards which were made up some years ago to carry the tonnage in the various towns of the States that we covered.

Q. Were those cards based on actual invoice figures?

A. That is correct.

Q. Was the information set forth on the cards put thereon at the time the invoices came through your records?

A. That is correct.

Q. What happened to the actual invoices, themselves, on white lead-in-oil, dry white lead, and oxides for the year 1941?

A. The invoices were destroyed.

Q. Do you know when they were destroyed?

3038 A. They were destroyed some years back, five or seven or eight years back. That I cannot recall.

Q. 1941 is six years ago, so do you want to amend your answer? You mean there was a regular practice of destroying records after a certain period of time?

A. That is correct, that is what I had in mind.

Q. And these records you find are destroyed?

A. That is correct.

Mr. DuBose: Off the record.

(Discussion off he record.)

3039 Trial Examiner Norwood: On the record.

Mr. DuBose: At this time I wish to offer in evidence Respondents' Exhibits which have heretofore been identified as 160-A to -R, inclusive; 161; 162-A to -D, inclusive; 163-A to -G, inclusive; and 164, all now marked for identification.

Mr. Wright: Pursuant to agreement of counsel, I would like to defer my cross-examination on the identification of these documents to the hearing in New York next week. I understand this witness will be produced there, and that in the meantime we can have these photostated and I can be supplied with copies thereof.

Mr. DuBose: That is satisfactory.

Trial Examiner Norwood: Counsel may conduct a voir dire examination in New York.

Mr. Wright: May we take a short recess?

Trial Examiner Norwood: Very well, we will have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Higgins, as I understand it, may stand aside, subject to reappearing in our New York hearing.

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Very well.

(Witness temporarily excused.)

Mr. Dubose: Mr. Matthiessen, will you take the stand?

3040 Trial Examiner Norwood: Have you been sworn in this case, Mr. Matthiessen?

Mr. Matthiessen: Not yet.

C. S. MATTHIESSEN was thereupon called as a witness for the respondent National Lead Company and, having been first duly sworn, testified as follows:

Trial Examiner Norwood: Give me your name, please, sir.

The Witness: C. S. Matthiessen.

Direct Examination by Mr. DuBose.

Q. Mr. Matthiessen, whom are you employed by?

A. John T. Lewis & Bros. Company, in Philadelphia.

Q. In what capacity?

A. At present I am a salesman on the road.

Q. Selling what product?

A. All their products.

Q. Does that include white lead-in-oil?

A. Yes, sir.

Q. And how long have you been associated with the white lead-in-oil business of John T. Lewis & Bros. Company?

A. Since April 28, 1906.

Q. Mr. Matthiessen, I show you documents which have been marked Respondents' Exhibit 165-A to -O, in-

3041 clusive, for identification, and ask you what they represent?

A. These figures represent the actual freights taken from our paid railroad freight bills and various carriers' freight bills.

Q. Were these documents which have just been marked Respondents' Exhibit 165-A to -O, inclusive, for identification, prepared by you or under your supervision?

A. These were prepared by me and obtained from a distribution of expense book, from which I obtained these voucher numbers, headed White Lead-In-Oil. These are the actual amounts paid for freight.

Q. In other words, Mr. Matthiessen, taking the first column on the left, the heading above that is what?

A. January 1941.

Q. And under the heading "Voucher", the first item is 8335.

A. Yes.

Q. What does that represent?

A. That represents the voucher number on which those bills were paid.

Q. And the item under the heading "Par" is what?

A. That represents the freight paid in Par Territory.

Q. In other words, is it correct to say that the sum of $1.89 represents a figure which was obtained from an actual voucher of John T. Lewis & Bros. Company, representing a sale by that company of white lead-in-oil in the Par Territory?

3042 A. That is correct.

Q. And the items which appear under the heading "1/8" represent what?

A. They represent the freight paid in the territory which covers the 1/8 territory.

Q. Now that first figure under the 1/8 column, of $8.85—does that represent an actual freight bill which was paid in connection with a sale of white lead-in-oil by John T. Lewis & Bros. Company in January, 1941, in the 1/8 white lead-in-oil territory?

A. Correct.

Q. And that figure was obtained from Voucher No. 8337 of that company?

A. That is right.

Q. And were the items under the column headed "3/8" similar—16 obtained from actual vouchers?

A. Exactly.

Q. And is it correct to say that those represent actual freight paid by John T. Lewis & Bros. Company for sales of white lead-in-oil in January, 1941, to customers who were located in the 3/8 cent per pound white lead-in-oil territory?

A. That is correct.

Q. There are three columns on this exhibit, Respondents' Exhibit 165-A for identification, three main columns or divisions. What do they represent?

3043 A. They represent the total freight paid in the month of January, 1941, for the Par Territory, the ½ Territory, and the ⅜ Territory.

Q. And is the middle column a continuation of column 1?

A. That is correct.

Q. And the total, following column 3, is the total of all the items theretofore listed?

A. That is correct.

3044 Q. And the figure opposite the word "Total", under the heading "Par", of 40647, represents $406.47?

A. That is correct.

Q. Now at the bottom of the page, opposite the word "Cartage" is the figure $207.41—what does that represent?

A. That represents the actual cartage paid in par territory, and is figured out by the method of obtaining our cartage rates, which are all expenses paid for automobiles, plus their depreciation.

Q. From what record or records was that item opposite the word "Cartage" obtained?

A. I do not know that, sir, since I didn't obtain that. This was supplied me by Mr. A. M. Wilson.

Q. And who is Mr. A. M. Wilson?

A. He is the vice president of our company.

Q. Taking the other documents which have been marked respectively Respondents' Exhibit 165-B to O, inclusive, for identification, were those figures there set forth similarly obtained and from similar actual vouchers of John T. Lewis Bros. Company?

A. Exactly, sir. I examined every freight bill for the whole year of 1941.

Q. And these other pages represent the figures by month from February through December, inclusive, 1941?

A. Correct.

3045 Q. And they represent, do they not, actual freight paid by John T. Lewis Bros. Company on white lead-in-oil sales in par, ½ cent and ⅜ cent territories?

A. Correct.

Q. Plus the figure, in each month, for cartage, which you say was supplied by Mr. A. M. Wilson?

A. Correct.

Q. I show you Respondents' Exhibit 166-A for identification and ask you what that represents?

A. That represents the tonnage obtained from our IBM records; they are actual net sales.

Q. In other words, that shows the total pounds sold by John T. Lewis Bros. Company with respect to white lead-in-oil for the year 1941, in par, Plus ⅛ cent, and Plus ⅜ cent white lead-in-oil territories?

A. That is correct.

Q. And do the figures under "Total Frt. Cartage" represent the total of the figures set forth in these work sheets which have been marked Respondents Exhibit 165-A to -O, inclusive for identification?

A. Correct.

Q. What are the figures under "Average Frt. Per CWT"?

A. That is the average freight per cwt.

Q. How was that arrived at?

A. By taking the dollars and dividing the number
3046 of pounds into them to get our average freight rate.

Q. Per hundred pounds?

A. Yes.

Q. And that shows the average freight actually paid by John T. Lewis Bros. Company per hundred pounds for white lead-in-oil sold by that company in Par, ⅛ cent and ⅜ cent territories?

A. That is correct.

Q. I show you Respondents' Exhibit 166-B for identification and ask you what that represents?

A. That represents a summary of the work sheets, with their totals added, for the Par territory including the cartage, the ⅛ territory and the ⅜ territory, with proof of the sheet worked out on the right-hand column.

Q. And the totals which there appear are the same as the figures under the heading "Total Ft. & Cartage" appearing on Respondents' Exhibit 166-A for identification?

A. Correct.

Q. And this is a recapitulation, by month, of your work sheets which are Respondents' Exhibit 165-A to -O, inclusive, for identification?

A. Correct.

Mr. DuBose: At this time I offer in evidence Respondents' Exhibit 165-A to O, inclusive for identification, and Respondents' Exhibit 166-A and -B for identification.

3047 Mr. Wright: As in the case of the prior exhibits identified by Mr. Higgins, I would like to reserve my right to cross-examine on the identification of these exhibits until we resume again in New York.

Trial Examiner Norwood: Is that satisfactory to counsel?

Mr. DuBose: May we go off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: With respect to this witness' recall to the stand, in view of his own personal situation I am not prepared to state with any assurance that he will be recalled next week, but I do state that if we are to proceed with the proffer we will recall him and submit him to such examination not only in connection with the identification but subsequent examination if desired by counsel, or else we will have to withdraw the proffer of the exhibits.

Mr. Wright: That is entirely satisfactory so long as we have that understanding.

Mr. Ewing: You will either have the opportunity to examine him or you will not have to struggle with this batch of documents.

Trial Examiner Norwood: Are there any further questions of this witness?

3048 Mr. DuBose: Not at the present time. I understand that Your Honor is reserving his ruling on the offer, subject to the right of cross-examination by counsel for the Commission at some subsequent date.

Trial Examiner Norwood: That is correct. The witness will now be excused with the understanding that he is to appear later for further examination on the identification of these documents.

(Witness temporarily excused.)

Trial Examiner Norwood: What is your further pleasure, gentlemen?

Mr. Ewing: I suggest that we adjourn until Tuesday morning next, at ten o'clock in the Bar Association Building, Room 605, in New York City.

Trial Examiner Norwood: Is that satisfactory to you?

Mr. Wright: That is satisfactory.

Trial Examiner Norwood: This hearing will now adjourn to reconvene in New York City, in the Hearing Room of the Bar Association, 36 W. 44th Street, on Tuesday next, June 17, 1947, at 10 o'clock Eastern Daylight Saving Time.

(Whereupon, at 3:40 p. m., June 12, 1947, the hearing in the above-entitled matter was adjourned.)

3049 Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 17, 1947.

Met, pursuant to adjournment, at 10:00 a. m., USST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

3050 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment on June 12, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y. at 10:00 o'clock a. m., daylight savings time on June 17, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq.,

appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for National Lead Company.

Proceed.

Mr. Ewing: I call Walter P. Carroll.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Walter P. Carroll, 900 West 18th Street, Chicago, Illinois.

WALTER P. CARROLL was thereupon called as a witness for the Respondents and, having been first duly
3051 sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. What is your full name?

A. Walter P. Carroll.

Q. What is your address?

A. 900 West 18th Street, Chicago, Illinois.

Q. Mr. Carroll, are you connected with the National Lead Company?

A. Yes, sir.

Q. In what capacity?

A. As manager of the Chicago branch.

Q. Are you also a director of the company?

A. Yes, sir.

Q. Will you tell us when you were first employed by the National Lead Company?

A. In August 1910.

Q. In what capacity were you then employed?

A. A clerk in the sales department.

Q. How long did you work in that capacity?

A. Until 1926 when I was appointed sales manager.

Q. What products did you sell while you were a salesman?

A. Oxides of lead, dry oxides of lead and metals.

Q. And in charge of what department of sales were you sales manager? I mean what products?

3052 A. Oxides and metals.

Q. How long were you sales manager?

A. Until 1938 when I was appointed assistant manager of the branch.

Q. How long did you serve as assistant manager of the branch?

A. Until 1941 when I was made manager.

Q. And you have been manager ever since?

A. Yes, sir.

Q. When were you first elected a member of the Board of Directors?

A. In September 1943.

Q. And you have been a member of the Board ever since; is that right?

A. Yes, sir.

Q. Does the Chicago branch include a manufacturing plant?

A. It includes three manufacturing branches at the present time.

Q. Plants?

A. Yes, sir.

Q. Will you tell us what they are?

A. The southern plant at 900 West 18th Street now manufactures metals. The Carter plant at West Pullman manufactures white lead, dry and in oil, paint and oxides,
and the Raymond plant on the near west side manu-
3053 factures or fabricates, extrudes and rolls tin, lead
and allies thereof.

Q. Were you a member of any committee or committees which considered proposed revisions for a supplementary code in connection with the NRA?

A. Yes, sir.

Q. Do you recall what committee or committees you belonged to in that connection?

A. The Oxide Division or committee.

Q. Do you recall attending meetings of such a committee during the days preceding the adoption of the supplementary code for the lead industries?

A. Yes, sir.

Q. Do you recall whether you attended any meetings of the Dry Products Committee of the Lead Pigments Division during the days preceding the formulation of the code?

A. Yes, sir.

Q. Do you recall any particular date or dates of such meetings?

A. No, sir.

Q. I show you Commission's Exhibit 504-A and B and ask you to look at the two pages and read them to yourself (handing to witness).

A. Yes, sir.

Q. Now will you tell us, Mr. Carroll, whether your recollection is refreshed as to attendance at a Dry
3054 Products Committee meeting of October 27, 1933?

A. Yes, sir.

Q. Did you attend such a meeting?

A. Yes, sir.

Q. Will you tell us in what connection the various subjects reported in the minutes were discussed at that meeting?

Mr. Wright: Your Honor, I object. I would like to avail myself at this time of a short voir dire examination on the refreshment of this witness' memory from that document.

Trial Examiner Norwood: Is there any objection?

Mr. Ewing: I have no objection.

Trial Examiner Norwood: Proceed.

Mr. Wright: Mr. Carroll, do you have any independent recollection of that meeting?

The Witness: Yes, sir. That is, I couldn't remember the dates.

Mr. Wright: Can you visualize now in your own mind that particular meeting?

The Witness: Yes, sir.

Mr. Wright: Can you recollect where it was held?

The Witness: It was at the Chicago Athletic Club.

Mr. Wright: What was the date of that meeting?

The Witness: I don't know the date except as
3055 you have it there.

Mr. Wright: Do you recall who was at the meeting?

The Witness: Well—

Trial Examiner Norwood: (Interposing.) Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Did you say that you recall who was in attendance at that meeting, Mr. Carroll?

The Witness: Well, I know Mr. Rowe was at the meeting. The others I would be merely guessing.

Mr. Wright: You don't recall anyone else at the meeting specifically?

The Witness: I know all of them that would be attending the meeting.

Mr. Wright: I want you to recall who was at the particular meeting.

The Witness: I couldn't recall who was at that particular meeting.

Trial Examiner Norwood: After looking at that if he knows he was at that meeting even though he doesn't remember many details, it would be sufficient to let him tell what he does remember about it.

Proceed.

By Mr. Ewing:

3056 Q. Now will you tell us, Mr. Carroll, in what connection the various subjects discussed at the meeting of the Dry Products Committee of the Lead Pigments Division of October 27, 1933, were discussed?

A. For the purpose of a supplementary code.

Q. Was the meeting considering various suggestions with respect to the supplementary code then in process of formulation?

A. Yes, sir.

Q. Do you recall attending a meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association or meetings in December 1933?

A. I couldn't say what month it was.

Q. I show you Respondents' Exhibit 137-A and B and ask you to read it to yourself (handing to witness).

A. Yes, sir.

Trial Examiner Norwood: Does that refresh your recollection about that meeting?

The Witness: Yes, sir.

By Mr. Ewing:

Q. Will you tell us whether you attended a meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association on December 14 and 15, 1933?

A. Yes, sir.

Q. Will you tell us whether you have any recollection of attending another meeting of that committee later

3057 in that same month?

A. No, sir.

Q. I show you Respondents' Exhibit 138-A and ask you to read it and then state whether your recollection is refreshed?

Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: On the record.

By Mr. Ewing:

Q. Does it refresh your recollection?
A. Yes, sir.
Q. Did you attend a meeting of the Lead Oxide Committee subsequent to the meeting of December 14 and 15, 1933, which was held later in December?
A. Yes, sir.
Q. Now in what connection were the subjects recorded in the minutes of those two meetings which are in evidence as Respondents' Exhibits 137-A and B and 138-A discussed?
A. For the purpose of the supplementary code.
Q. I direct your attention to the first full paragraph following the attendance listing of the minutes of the meeting of December 27 and 28, 1933, Respondents' Exhibit 138-A and to the reference therein to the question of establishing zones.

Mr. Wright: Your Honor, this witness has already refreshed hi ecollection from that document. I think
3058 from now on we can have his independent testimony regarding it and I object to any further displaying of the document to the witness and having him read from it.

He has already testified that his recollection has been refreshed as to that meeting.

Mr. Ewing: I haven't asked a question. I have directed his attention to this and then I want to ask the question.

Trial Examiner Norwood: I would ask the question and let him say that he doesn't recall it sufficiently and then he can refresh his recollection.

Mr. Ewing: The question that I am going to ask does not relate to what happened at that meeting. It just relates to this subject and I want to show what the subject is.

Mr. Wright: Your Honor, the witness testified a moment ago that he knew every subject in those minutes was discussed for the purpose of a supplementary code. Now if he testified as to that, then he must have known what the subject of those minutes were.

Mr. Ewing: I am not asking him that. There isn't any question before us.

Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: On the record.

3059 By Mr. Ewing:

Q. So far as you know, Mr. Carroll, did the manufacturers of lead oxide make any agreement in regard to the establishment of zones in connection with the sale of lead oxides in the south and west portions of this country?

A. No, sir.

Q. I ask the same question with the addition, did they reach any agreement among themselves or make any agreement among themselves in regard to the establishment of zones in connection with the sale of lead oxides as far as the supplementary code was concerned?

A. Not that I recall.

Q. What?

A. Not that I recall.

Q. I show you a copy of the printed code of fair competition for the lead industries in evidence as Commission's Exhibit 809, and direct your attention to Article 2 which is headed "Conditions for sale of lead oxides in lots of at least 20 tons." That is Article 2 of schedule "A."

Do you recall whether at the meeting of the Lead Oxide Committee of the Lead Pigments Division of the Lead Industries Association held on December 27 and 28, 1933, a basis for sale of oxides at differentials over lead was discussed?

Just do you recall yes or no.

3060 A. Yes, sir.

Q. Does Article 2 of schedule "A" of the code, Commission's Exhibit 809, reflect the basis discussed at the meeting of the Lead Oxide Committee on December 27 and 28, 1933?

A. It does reflect it.

Q. So far as you know was there any agreement between the producers of lead oxide as to the amount of the differential to be added to the common lead price at New York?

A. No, sir.

Q. Were you in charge of the sale of lead oxide for the Chicago branch prior to 1933?

A. Yes, sir.

Q. Did you sell lead oxides yourself prior to 1933?

A. Yes, sir.

Q. Will you tell us whether, prior to 1933, freight was ever added to the sales price of lead oxides in sales to the various territories served by the Chicago branch?

A. Yes, sir.

Q. By whom was that freight paid?

A. The freight was paid by the customer, the buyer.

Q. Will you tell us in what territories sales of that nature occurred, if you can recall?

A. In Montana and Wyoming.

Q. Did the Chicago branch normally serve those territories?

A. We do from a sales end but from manufacturing we need to ship from Chicago or St. Louis.

3061 Q. When the customer paid for the freight in those instances, was the freight from the point of actual shipment to the destination?

A. No. We added part of the freight. If the freight was more than a quarter, we added probably the difference.

Mr. Wright: Your Honor, I move to strike that last answer. It was obviously a guess and a hypothesis so far as the witness is concerned.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. When the customer paid for the freight in those instances, was the freight from the point of actual shipment to the destination?

"A. No. We added a part of the freight. If the freight was more than a quarter, we added probably the difference.")

Trial Examiner Norwood: Motion denied. You can cross-examine him on that.

By Mr. Ewing:

Q. Mr. Carroll, in stating your answer to the preceding question, what do you mean when you said "we added part of the freight over 25¢?"

3062 A. The car load freights to some of those western points where we sent special oxides amounted to, I would say, from 60¢ to $1.25 car load and LCL. And we have added, to my recollection, as much as 80¢ to the regular price delivered in the normal territory.

Q. If the freight was 25¢ or less, did you add freight?

A. No, sir.

Q. If the freight was 25¢ or more, did you absorb it to the extent of 25¢?

A. Approximately.

Q. Now prior to 1933, will you tell us approximately the number of special oxides that the Chicago plant manufactured?

A. We manufactured over 25 oxides with various variations for the various trades; different weights, acid absorption and so forth, dependent upon the requirements of that particular business.

Mr. Ewing: I ask that these be marked Respondents' Exhibit 167-A to O inclusive for identification and that we have permission to have them photostated and the photostats substituted.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection, your Honor.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 167-A to O inclusive.

3063 (The document referred to was marked Respondents' Exhibit 167-A, 167-B, 167-C, 167-D, 167-E, 167-F, 167-G, 167-H, 167-I, 167-J, 167-K, 167-L, 167-M, 167-N and 167-O for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Carroll, I show you these cards that have been marked Respondents' Exhibit 167-A to O for identification and ask you whether you brought those cards here from Chicago (handing to witness)?

A. Yes, sir.

Q. Will you tell us what they are?

A. They are the changes in price mailed to the general trade using oxides in the Chicago district.

Q. Do they relate to price changes prior to the adoption of the code?

A. Yes, sir. That is, for as long as we had them that far back.

Q. Have you any price cards earlier than Respondents' Exhibit 167-A for identification which bears the date effective February 6, 1929?

A. Those were all we had available prior to that date.

Mr. Ewing: I offer Respondents' Exhibit 167-A to O inclusive in evidence.

Trial Examiner Norwood: Is there any objection?

3064 Mr. Wright: No objection.

Trial Examiner Norwood: They will be received in evidence as Respondents' Exhibit 167-A to O inclusive.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 167-A, 167-B, 167-C, 167-D, 167-E, 167-F, 167-G, 167-H, 167-I, 167-J, 167-K, 167-L, 167-M, 167-N and 167-O, was received in evidence.)

By Mr. Ewing:

Q. Were these price cards which are now in evidence as Respondents' Exhibit 167-A to O inclusive, the cards showing the price changes of the National Lead Company, Chicago branch?

A. Yes, sir.

Q. Who was president of the National Lead Company during 1933-1934?

A. Mr. Edward J. Cornish.

Q. Did you know Mr. Cornish?

A. Yes, sir; very intimately.

Q. Is he now alive?

A. No, sir.

Q. During the NRA period, meaning that time in 1933 following the passage of the National Recovery Act and up until the Supreme Court's declaration of its unconstitutionality in May 1935, did you ever have occasion to discuss with Mr. Cornish the National Lead Company's

3065 policy generally relative to the purpose and intent of the National Recovery Act in the regular course of your business?

A. Yes, sir.

Q. Will you tell us what company policy Mr. Cornish expressed to you at that time?

Mr. Wright: Objection, Your Honor, it is hearsay.

Mr. Ewing: It is the regular course of business and it is in the nature of instruction from the president to the assistant manager of the Chicago branch.

Mr. Wright: There have been nothing about instructions here and the only way that the regular course of business crept in was in counsel's question.

All that has been established was that he talked with Mr. Cornish and that Mr. Cornish told him certain things about the policy of the company.

Trial Examiner Norwood: Isn't that the only way that

you can show his policy is what he said to his subordinates. In other words, you are proving a state of mind here.

Mr. Wright: I think that question goes way beyond a state of mind. This is a question: what were the policies of the National Lead Company at that time? . .

Mr. Ewing: He is the chief executive.

Trial Examiner Norwood: We have been delving into the mental attitude of all of these people on this one
3066 subject and a state of mind is involved and company policy, and he can tell us that.

Mr. Wright: This is certainly hearsay of the first water and there has been no showing that competent evidence, primary evidence, as to what the policy of the National Lead Company at that time prior to the NRA, can be produced.

There hasn't been any showing as to how he came into possession of this information, whether it was in the regular course of business in connection with his official duties or whether it was a personal conversation in the observation car of a train somewhere, or on a golf course.

Mr. Ewing: I asked him if he had any conversations in the regular course of his duties.

Trial Examiner Norwood: I will ask him this on voir dire.

Was this statement that he had with you an official statement that he made to you, something that was intended to guide your conduct in these matters?

The Witness: Yes, sir.

Trial Examiner Norwood: I will overrule the objection.

Mr. Ewing: Will you read the question, please?

(The reporter read the question as follows:

"Q. Will you tell us what company policy Mr.
3067 Cornish expressed to you at that time?")

The Witness: While Mr. Cornish was in sympathy—

Trial Examiner Norwood (Interposing.): Wait a minute now. Tell us what he said as indicating what it was. You can't read his mind. You can only tell what he said to you at those times in regard to official matters and in connection with your official duties.

Please confine your answer to that.

The Witness: He warned me that we should have nothing to do with price fixing because he considered the NRA a temporary and non-workable act. And as long as the

Sherman-Clayton Acts were on the books, that the company would live in their memory and that we could stand on our fifty years of business where we had established a reputation for quality, service and integrity; and that price fixing only shielded weaker competitors.

Mr. Wright: Your Honor, I move that that entire answer be stricken as stating the personal opinions expressed in hearsay. Certainly that has nothing to do with the official duties and instructions of this witness.

He was telling us what was in Mr. Cornish's mind.

Trial Examiner Norwood: Motion denied. We will take a five-minute recess at this time.

(A five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

3068 By Mr. Ewing:

Q. Mr. Carroll, I show you Respondents' Exhibit 167-A and ask you to explain the terms 60-2 per cent-15 set forth thereon?

A. The 60 days are net. In other words, when a bill is paid before 60 days, they pay it net. If they pay it on or before 15 days, they are allowed 2 per cent cash discount.

Q. Now I show you Respondents' Exhibit 167-0, and ask you to explain the terms 30-1 per cent-10 there?

A. The 30 days are the net time in which the bill is due net, and the 1 per cent is allowable if paid within 10 days from date of invoice in all instances.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 168 for identification and in that connection I ask permission to have it photostated and a photostat substituted.

Trial Examiner Norwood: Leave will be granted to substitute a photographic copy and it will be marked Respondents' 168 for identification.

(The document referred to was marked Respondents' Exhibit 168 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I show you Respondents' Exhibit 168 for identification and ask you whether you produced that and
3069 gave it to me (handing to witness)?

A. Yes, sir.

Q. I direct your attention to the date July 28th which appears without the year. I withdraw that question.

Will you tell us what that paper is, Respondents' Exhibit 168 for identification?

A. This is a clipping that I took from the Chicago Tribune of July 28, 1934, a statement by Mr.—

Q. (Interposing) No. Did you yourself cut this out of the Chicago Tribune?

A. Yes, sir.

Q. At or about when?

A. On or about July 28, 1934, the day I read it in the paper.

Q. Do you make it a practice to collect clippings?

A. I have collected a few.

Q. How many besides this clipping?

A. This was in a book with two others which I was rather proud of.

Q. What were the other two?

A. The first was the result of a scholarship examination in the archdiocese of Chicago in which I had the highest score ever made and the other was a clipping from a San Antonio paper when I was commissioned a lieutenant in the Signal Corps in 1917, and the other is this one, this 3070 article, Respondents' Exhibit 168, confirming Mr. Cornish's stand on the NRA.

Q. And you say you kept it to see whether his words would come true?

A. Yes, sir.

Q. Do the statements attributed to Mr. Cornish in this clipping, Respondents' Exhibit 168 for identification, correctly set forth his directions of a similar nature to you?

A. Yes, sir; and I would like to read them.

Mr. Ewing: I offer it in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I have no objection to the admission of this document into the record as such. I do object and move to strike the statement which the witness just made in answer to Mr. Ewing's last question which was a highly improper question and answer regarding whether this accurately reflected what Mr. Cornish had told the witness, because this obviously is a statement by Mr. Cornish to other people which had nothing to do with his statements to the witness.

Mr. Ewing: Well, I didn't intend to imply in my question that it had. I intended to ask as to whether it was an expres-

sion of a nature similar to the ones that were made to
3071 him.

Mr. Wright: That is exactly the point that I object to. He has already testified over my objection to what Mr. Cornish told him in his official business.

Trial Examiner Norwood: Inasmuch as there is no objection to this Respondents' Exhibit 168 for identification—

Mr. Ewing: (Interposing.) I am perfectly willing to consent to have the last question and the answer that has been the subject of discussion struck.

Trial Examiner Norwood: The last question and the answer will be struck, and the exhibit is received as Respondents' Exhibit 168 as marked.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 168, was received in evidence.)

Trial Examiner Norwood: It is understood that only the face of the exhibit is received in evidence.

What is the title there?

Mr. Ewing: "National Lead Shuns NRA Price Fixing, Sees Anti-Trust Law."

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Was Mr. Cornish a lawyer, if you know?

A. Yes, sir.

Q. Was he?

3072 A. Yes, sir; the best.

Q. Will you tell us generally whether the Board of Directors of the National Lead Company acts to establish prices for its lead pigments products?

A. The Board as such does not. It is usually left to the department heads to establish the price.

Q. That answer has reference to your own experience on the Board since September 1943?

A. Yes, Sir.

Mr. Ewing: That is all. You may cross examine him.

Trial Examiner Norwood: Cross Examination.

Cross-Examination by Mr. Wright.

Q. Mr. Carroll, how did your company sell oxides in car load lots prior to 1943? How did they quote them?

A. Oh—

Q. (Interposing.) I will withdraw the question. Prior to 1943 in quoting on oxides, were there any differentials over your base or Chicago price on account of the location of the customer?

A. No, sir.

Q. Was it a flat price then?

A. A flat price.

Q. The same as the Chicago price?

3073 A. Yes, sir. Pardon me. That's right.

Q. Anywhere in the territory served by the Chicago branch?

A. Yes, sir.

Q. That is your car load business now?

A. Yes, sir.

Q. Does that include the Montana and Wyoming territory?

A. No. Those were specials.

Q. How did you set that up?

A. They were special oxides that we would ship out to points for all oil companies for oil refining to those points.

Q. Was that car load business?

A. In some instances car load and in some instances less than car load.

Q. The car load price then anywhere in North Dakota at that time would be the same as the car load price in Chicago; is that correct?

A. No. We added the freight, part of the freight, from Chicago or St. Louis, depending on where we shipped it from.

Q. That is exactly what I was trying to get at. Then you didn't mean in your answer that you sold at the same price including freight transportation charges anywhere in the territory of the Chicago branch office prior to 1934?

A. Well, Montana, or Wyoming and Montana were not in Chicago territory.

3074 Q. But you did ship to them?

A. We shipped to them because the purchasing department or head office was in the Chicago district.

Q. How about North Dakota? Did you ship into North Dakota?

A. Not that I recall; no, sir.

Q. How far south did you ship from the Chicago office?

A. Nothing that I can recall.

Q. What was the territory prior to 1934 in car load business of the Chicago branch?

A. Michigan, Wisconsin, the northern half of Illinois and the corner of Indiana and Ohio.

Q. That was the branch territory?

A. Yes, sir.

Q. But you did ship outside that territory from your manufacturing plants there?

A. We made a few shipments of special oxides out of that territory; yes, sir.

Q. Just the special oxides?

A. Yes, sir.

Q. Didn't the Chicago branch ship into the territory on into the area of the Cincinnati branch?

A. That is true, we shipped for Cincinnati.

Q. In other words, the Chicago branch and the Cincinnati branch are sales and billing and head-office divisions which include the manufacturing plants but the man-
3075 ufacturing plants will often serve more than one branch territory on oxides; is that correct?

A. Correct. We ship that for the account of Cincinnati and it would be billed from Cincinnati and not from Chicago.

Q. You don't know the price that it would be billed at?

A. No, sir. We would bill the National Lead Company in Cincinnati and they in turn would bill the customer.

Q. So since 1934 in the car load oxide business, the Chicago branch served par territory, as you call it now, with no differential for freight added except in special instances in Montana and Wyoming?

A. Yes, sir.

Q. Now with reference to your card business, I show you Respondents' Exhibit 167-O, terms f.o.b. Chicago, Detroit and Milwaukee. What is the significance of that statement?

A. We shipped from Chicago, Detroit or Milwaukee warehouses.

Q. How did you handle freight or transportation on those?

A. In car loads we would deliver at this price and at less than car loads it would be f.o.b. the warehouse.

Q. With freight or cartage added?

A. Yes, with that paid for by the customer.

Q. Do you know the territory that those warehouses were? What physical territory does the Detroit warehouse serve on the car load business?

3076 A. Detroit would take fifty miles around Detroit and Milwaukee would take 20 or 25 miles around Mil-

A. (Interposing.) And in some instances we shipped

Q. Well now,—

A. (Interposing.) And in some instances we sphipped depending on whether we would save money.

Q. In some instances on less than car load you shipped direct from the plant to the different warehouses; is that correct?

A. Yes; and vice versa.

Q. How would you handle a charge of that sort? Would you add freight?

We are talking about prior to 1934. Would you add freight from the nearest warehouse point?

A. No. They would pay the freight. We would ship it collect.

Q. They would pay the freight from Chicago in the case that you shipped it?

A. Yes, sir.

Q. These card prices, I assume that is what is represented by the cards, Exhibit 167-A through O?

A. These are the prices we would print at Chicago when a charge was made in the pig lead market. An advance or a decline.

Q. These weren't car load prices, were they?

A. To some trade they would be car load prices.

3077 Q. To what trade would they be car load prices?

A. Well, to a special trade where the oxides were made specially.

Q. Would you give us an illustration of that?

A. Pottery, varnish, assayers and some color work.

Q. In the battery business, for instance would these prices represented by Exhibit 167 and the sub-numbers be car load or less than car load prices?

We are talking now about the dates of these cards.

A. As of the dates of these cards?

Q. Yes.

A. They would be less than car load.

Q. As of the date of that card which you have there, Exhibit 167-O, would that represent a quotation on red lead and the litharge in drums or barrels in any quantity less than a car load?

A. Yes.

Q. In other words, they had no 5-ton price at that time?

A. I won't say as to that. That I couldn't remember as far back.

Q. It says nothing in the cards about any other price?

A. That's right, it says nothing on the card.

Q. You can't recall the price classification?

A. No, sir; not definitely.

Q. Now getting back to these people to whom
3078 these were the car load prices, what were the less than car load prices to these special classes of trade at that time?

A. Well, most of those were car load and if they were less than car load, they might have been the same because there would be very few of them to the best of my knowledge at this moment.

Q. Very few of them who bought less than car loads in the varnish trade?

A. Yes, sir.

Q. In the color trade?

A. Yes, sir.

Q. Ceramics?

A. At that time; yes, sir.

Q. Pottery?

A. Yes, sir.

Q. Back in the period covered by these cards now, did your branch have so-called card contracts?

A. Yes, sir.

Q. With purchasers who purchased in card quantities?

A. Yes, sir.

Q. That is, less than car load quantities?

A. Well, we would cover them for, say, three months.

Q. At the card prices?

A. At the card prices, yes, for a given quantity in the hopes that they would take it in the largest deliveries
3079 possible.

Q. What was the duration of those contracts?

A. 90 days normally.

Q. A 90 day contract?

A. Yes, sir.

Q. You had similar contracts with car load purchasers, too, did you not?

A. Yes, sir.

Q. Do you now have 90-day contracts or any other type of requirement contract with purchasers at the so-called card prices on oxides?

A. No, sir.

Q. When did you abandon or cease using such contracts?

A. Well, due to our inability to obtain the pig lead and to know the price at which we paid for the lead, all orders were taken subject to the market at the time of the shipment or the average, for instance.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive.

Trial Examiner Norwood: Read the question and answer.

(The reporter read the question and answer as follows:

"Q. When did you abandon or cease using such contracts?"

3080 "A. Well, due to our inability to obtain the pig lead and to know the price at which we paid for the lead, all orders were taken subject to the market at the time of the shipment or the average, for instance.")

Mr. Ewing: I will consent to it being stricken.

Trial Examiner Norwood: Motion allowed.

By Mr. Wright:

Q. Can you tell me precisely or approximately the time at which the National Lead Company, the Chicago branch, ceased making these 90-day card contracts?

A. We have not ceased that I know of.

Q. When did you last enter into such a 90-day card contract?

A. That I don't remember.

Q. Were you entering into such contracts in 1938 and 1939?

A. I think we were.

Q. I am speaking now of card prices. I am not speaking of car load contracts or differential contracts.

A. Not that I recall.

Q. You were not using such contracts in 1938 or 1939?

A. Not that I recall.

Q. Were you using them in 1936?

A. I couldn't say then either without trying to look back at the records.

Q. Can you ascertain from your records when you last made a regular practice of entering into such con-
3081 tracts?

A. I don't know.

Q. You don't recall any such contracts since 1936, do you?

A. Yes. We have made commitments for specified quantities of oxides.

Q. Were they in the form of these 90-day card contracts?

A. No. They would be in the form of orders, an order given for 20, 30, or 40 or 50 tons for a future shipment.

Q. Now these contracts that I have been referring to which you said you employed at this time, they were printed form contracts, weren't they?

A. No, sir. We didn't have any printed form contracts at Chicago.

Q. Have you ever used printed form contracts at Chicago?

A. Not that I recall, no.

Q. On any of the oxides?

A. No, sir.

Q. Do you recall what changes in the methods of quoting and pricing the oxides were made in June of 1934?

A. In general there was no change made that I know of.

Q. What was your position in 1934 at the Chicago branch?

A. We sold oxides—

Q. (Interposing.) What was your position?

A. My position?

Q. Yes.

3082 A. I beg your pardon. I thought you meant—I was sales manager.

Q. You would be thoroughly familiar at that time, wouldn't you, with all the various sales policies with regard to these oxides?

A. Yes, sir.

Q. How they were to be priced and how they were to be sold?

A. Yes, sir.

Q. I show you a document, Respondents' Exhibit 159-A to J, which was identified by Mr. McNair as a letter that

he received as manager of the Atlantic branch on June 9, 1934, about the pricing of oxides and other pigments.

I also show you Exhibit 159-B, a letter of May 11, 1934.

Trial Examiner Norwood: Is that a Commission's exhibit?

Mr. Wright: That is Respondents' exhibit, your Honor.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. Do you recall ever having seen those letters or similar letters before?

3083 A. I never saw either of those letters or similar letters.

Q. Do those refresh your recollection as to the changes that were made in the terms and conditions of sale of oxides in that period of time?

A. I did not see that document.

Q. Do the statements in the document refresh your recollection any?

A. You see part of this was of no interest to me in Chicago because it was only the conditions that would pertain to Chicago—we did have the document that I recognized before, this printed document—

Q. (Interposing.) The code of fair competition?

A. That is what I had.

Q. Well—

A. (Interposing.) I did not see those letters from Mr. Rowe at any time.

Q. What was your answer then to my question as to whether reading those documents refreshed your recollection as to what changes you made in Chicago at that time?

A. I would have to read those more thoroughly.

Q. From your examination that you made, they don't refresh your recollection?

A. No, sir.

Q. Mr. Carroll, will you tell us again about how you quoted this freight differential in Montana and Wyo-

3084 ming when the freight was more than a quarter of a cent per pound?

A. In those instances we added the difference between the car load or less than car load rate as obtained from the railroad for our traffic department.

Q. What did the quarter of a cent per pound have to do with it?

A. Because we had allowed usually—the freight in our district would amount to approximately a quarter of a cent.

Q. Was that average freight?

A. Well, not average freight but that would be the freight to the greatest distance at that time in the Chicago district.

Q. Then do I understand it that the freight was over 25¢ a hundredweight that the customer paid that difference?

A. No. Only where the freight was up on the 60¢ or 70¢ or 80¢ that we would recognize it.

Q. If the freight was just 50¢ then you allowed that?

A. I would say less than 50¢.

Q. Well now, just what is this figure now?

A. Well we have added from 25¢ to 80¢ that I recall vividly.

Q. What do you mean by "added?"

A. To the normal price for delivery in our district.

3085 Q. You have added 25 to 50¢?

A. 25 to 80¢.

Q. To 80¢?

A. Yes.

Q. Well now, can you tell us again just where you would add 25¢?

A. Well—

Q. (Interposing.) Where—

A. (Interposing.) This is, of course, as you remember as I said to you some time back that we were adding those prices.

Q. Yes, sir.

A. I do recall, as I say, adding as much as 80¢ a hundredweight on a shipment to one or the other of those points in Montana or Wyoming. I think it was Montana.

Q. But you don't recall any other details of the transaction?

A. Oh, yes. We shipped the material.

Q. What I mean is do you recall what the freight was?

A. It was 80¢.

Q. That was the actual freight incurred in shipping?

A. No. That was the difference what we would charge

them. In other words, if we would ship that out there we would be losing money. We couldn't stand the whole freight so we had to arrive at some freight so I added the difference of approximately 25¢.

3086 Q. What I am trying to get at are the mechanics by which you did it.

A. No special mechanics but it was my own.

Q. By transaction?

A. That's right.

Q. You might do one one day, and another the next; is that correct?

A. That's correct; yes, sir.

Q. Now I understood your testimony, Mr. Carroll, that all the subjects discussed in the minutes of these meetings which you attended were discussed for the purpose of drawing a code or fair competition; is that correct?

A. Yes, sir.

Q. You stated that you attended the October 27, 1933 meeting of the Lead Pigments Division. Do you recall that that was the case, particularly as to that meeting?

A. Yes, sir.

Q. What were the subjects discussed at that meeting?

A. I would not be able to tell you.

Q. You don't recall what the subjects were that were discussed?

A. Not the particular subjects at that particular meeting. In general I know what was discussed at all the meetings.

Q. But you can't tell what every particular discussion was?

3087 A. No, sir.

Q. Or what the subject of it was?

A. On the particular dates, no, sir.

Q. Can you recall all of the subjects which were discussed at the three meetings about which you testified, the one in October and the two in December?

A. Yes, sir.

Q. You can recall all the subjects which were discussed at those three meetings?

A. As I was refreshed on reading them.

Q. What were those subjects?

A. Well, if I had this code over here I could probably tell you everything that was in there.

Q. But your refreshment then a few minutes ago wasn't sufficient?

A. Oh, yes. But it isn't refreshed now. I can't retain that. I depend on the actual records.

Q. Were you testifying from the records or from your own recollection?

A. Both.

Q. Well, can you testify from your own recollection without the records in front of you?

A. Not as to what went on at any particular meeting.

Q. I am talking about the three meetings together. You attended only three as I take it?

3088 A. Yes sir.

Q. What was discussed at the three meetings without reference to whether it was a particular one?

A. The question of quantities and whether the custom of entering orders for tonnages over a certain period weren't nuisances, what constituted a delivery. For instance, delivery had to be made in 3 days, they would like to make it in three days to constitute a car load.

Who paid the cartage if the buyer's vehicle was used. Those I recall vividly.

Q. Do you recall any others?

A. No, sir; unless I could refresh my memory.

Q. Do you recall whether there was any discussion as to the advisability of putting into practice in advance of the code any of the practices which the members felt were desirable practices in the industry?

A. That was discussed.

Q. Do you recall what the discussion was on that?

A. No, sir; not the particular ones that were deferred, but I know we had—there were tentative decisions made and sometimes deferred.

Q. As to that particular subject now about putting those things in operation?

A. Yes, sir.

3089 Q. There were decisions made at those meetings to that effect?

A. Yes, sir. Well now just a minute. I said they were not made at that meeting. They were deferred.

Q. All such decisions were deferred

A. I wouldn't say all of them because there may be some of them that were not. Of course we had a number of these practices ourselves at Chicago.

Q. Some of the practices which were listed in those schedules attached to the code?

A. Yes, sir. Now because it might mean profit or loss to us. In other words, the custom of entering an order for a quantity of material which might not be taken at a particular time might result in a loss.

Q. Do you recall any discussion of the limitation of productive facilities?

A. No, sir.

Q. That wasn't discussed at any of the meetings?

A. No, sir.

Q. Was the question of differentials in price between the various grades of red lead discussed at those meetings?

A. Yes, sir.

Q. Was the question of selling oxides in less than car load quantities at a differential over pig lead discussed at those meetings?

3090 A. No, sir.

Q. Were the questions of the differentials over the price of pig lead for any sales discussed at those meetings?

A. No, sir.

Q. When you say "no, sir," do you mean in your statement that they positively were not discussed at the meeting?

A. None of the meetings that I attended, they were not discussed.

Q. Don't you mean rather that you didn't hear them discussed, or don't recall any discussion of the same?

A. Not in my presence.

Q. Then you can state categorically that they weren't discussed at the meetings officially, at any rate?

A. To me officially or unofficially.

Q. Yet you attended all of the discussions of the committees as such? You weren't absent from the room at any time there?

A. I might have gone out to the washroom or the telephone.

Q. You stated that there was no discussion at all regarding the limitation of productive facilities?

A. Yes, sir.

Q. I call your attention to the first paragraph of the October 27th minutes, Commission's Exhibit 504-A, the statement that the chairman suggested that the members proceed to discuss the third draft of the supplement-

3091 ary code, etc., whereupon a general discussion arose as to the desirability of including paragraphs which had been omitted from the third draft relating to the limitation of productive facilities, divergent views being expressed.

Wouldn't that indicate that there was a discussion of that question at the meeting?

A. Well, I don't recall it as such.

Q. In view of the fact that that appears in the official minutes which were represented to be records kept by the secretary of the Lead Industries Association of the discussions, wouldn't it indicate perhaps that your recollection might be a little faulty in some particulars as to exactly what was discussed?

Mr. Dubose: Have you read the entire paragraph?

Mr. Wright: No, sir.

Mr. Dubose: I object on the ground that the entire paragraph has not been read.

Trial Examiner Norwood: Overruled.

Mr. Wright: Did you understand my question?

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. In view of the fact that that appears in the official minutes which were represented to be records kept by the secretary of the Lead Industries Association of the discussions, wouldn't it indicate perhaps that your recol-

3092 lection might be a little faulty in some particulars as to exactly what was discussed?")

The Witness: Well, I don't know whether or not remembering that particular one would be a basis for forgetting or not being specifically clear on the other. That I wouldn't say, but I would leave that to the human element.

By Mr. Wright:

Q. You admit that it wouldn't be beyond human failings but there would be a number of things that might have been discussed fourteen years ago at those meetings which you wouldn't recall now; isn't that correct?

A. Some I might not recall; if they were important I think I would.

Q. But then when you answered as to exactly what was discussed, you were really answering so far as your memory serves you, were you not?

A. If they were important or an issue worthwhile, I am pretty sure I would recall it.

Q. Wouldn't you think that a question of including a paragraph, that a general discussion of the question of including a paragraph in the code relating to the limitation of productive facilities which resulted in the expression of divergent views, would be fairly important as an industry matter?

A. Well, I never heard of such a thing in this industry, in the thirty-seven years that I am active in it, and
3093 thirty-eight years connected with. I never heard of any expression from anyone asking to restrict production.

Q. Do you recall any discussion of dumping?

A. I would like to have you define dumping.

Q. I don't know, I am only using a term that appears in the minutes of one of these meetings.

Mr. DuBose: You are not referring to the meetings which Mr. Carroll attended.

Mr. Wright: Yes, sir; I am.

The Witness: Well, the only way you might apply dumping would be or could be, if that is what you are asking, could be that you might have an exceptionally high pig lead market and somebody who was afraid of the market might have sold some of the material at a special price, but that, I don't know about.

By Mr. Wright:

Q. You don't recall any question of dumping being discussed then at these meetings that you attended?

A. It could be, but again I say it wasn't important unless you can show me that it was important.

Q. Do you recall any discussions as to dry white lead that took place at any of these meetings?

A. Not particularly. I wouldn't pay so much attention to dry white lead because it wasn't my department.

Q. I take it then, from your statement of what Mr.
3094 Cornish told you, the clipping which you brought in, that if Mr. Cornish and the National Lead Company had engaged in any price fixing activities during the NRA, it would have been with full awareness of the existence of the anti-trust laws and of the fact that they were still in existence at the time, would it not?

A. I think with Mr. Cornish and I that it would be.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Is there any redirect examination?

Mr. Ewing: No redirect.

Trial Examiner Norwood: You are excused, Mr. Carroll.

(Witness excused.)

Mr. Ewing: Might we adjourn until 2:00 o'clock, Mr. Examiner?

Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?

Mr. Wright: Yes, Mr. Examiner.

Trial Examiner Norwood: We will recess at this time to reconvene at 2:00 o'clock.

(Whereupon, at 12:15 p. m., a recess was taken until 2:00 p. m., this day.)

3095 Afternoon Session

Trial Examiner Norwood: Come to order. Proceed, Mr. Ewing.

Mr. Ewing: I call J. R. Higgins.

J. R. HIGGINS, a witness called by the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Wright:

Q. Mr. Higgins, this series of documents which have been marked for identification as Respondent's Exhibit 160 through 164, about which you testified on direct examination, do you recall from whom in the National Lead Company's general office you received a request for this information?

A. The letter came into the office and I am not sure whether it was addressed directly to me. It was either addressed directly to me or one or two of the other officers of the company. I would say it came from Mr. Fred McCarthy.

Q. Do you recall what was in that letter of request? Do you recall what it specifically requested you to do?

A. Well, I saw a copy of the letter and it asked for certain information as to our records for 1941. Among the

other things was tonnage, freight and cartage and, as I recall, the end was the cost per hundred pounds, three
3096 classifications, as I recall it.

Q. Of the transportation charges?

A. Yes.

Q. Do you know what the purpose of the request was? Did the letter state the purpose?

A. I believe it did.

Q. Directing your attention now to the document marked Respondent's Exhibit 164, there is a statement there: "The following is the information you requested in your letter of March 26, 1947." Is that the letter referred to there, the letter of March 26th, the original request for this information?

A. That's correct.

Q. But you do not recall as I understand your testimony, what was in that letter as far as the purpose for which the material was requested or specifically the details of the request?

A. I do not recall that, except the details of the request according to the three columns as shown.

Q. This recapitulation, then, in Exhibit 164, that is a summary of all the work sheets of the other exhibits; is that correct?

A. That's correct.

Q. And that is the final boiling down of the information?

A. That's correct.

3097 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. Will you tell us exactly the procedure that you followed in requesting this information from your staff and the technique which you followed in obtaining it?

A. When I received a copy of the letter, I contacted Mr. Sargent who signed that letter and told him that as far as I knew, our 1941 records had been destroyed. I was somewhat concerned to know how or in what way we could answer that letter, and give him the information that had been requested. After taking—attempting to find out the tonnage records, somebody came up with the answer that we put a card system into effect a number of years ago. I

think I started it back, possibly some years before, at least, and trying to find the tonnage of the states, the large cities, and then the smaller towns.

I was interested in knowing just where the tonnage was going or being distributed. From that, one of the young ladies, I should say, who has charge of the filing card system, said she had the tonnage of the towns where the white lead had been distributed during the year of 1941. So we used that as a basis. It came up with the tonnage of
3098 each of the towns indicated for white lead and the different classifications, dry white lead, oxides and anything else that was requested.

Q. Now, that is as to the figures which appear in the work sheets under tonnage, and also in the other exhibits under total pounds sold.

A. That's right.

Q. That is the derivation of those figures?

A. That's right.

Q. Now, what instructions did you give regarding the information on freight and cartage?

A. We made an effort, first, to determine from our warehouses, speaking of warehouses, branches of the St. Louis branch, and as I recall, we had certain haulage or truckage as the case might be, and in going into that record, we found that we could get actual figures on the cartage from the warehouses and from St. Louis, so that that portion of our records is what I would call factual information. That is absolutely correct and it is added into the total figure.

Q. Just what do those cartage figures consist of? How were they secured? From what records were they taken? How were they fitted into this thing?

A. They were taken into the record from our auditing department. I can't tell you where the details would be kept.

Q. Do you know how they kept those figures in the
3099 auditing department?

A. We have five different branches.

Q. In the St. Louis branch?

A. Yes. We call them warehouses which designates the warehouses separately so that we could check back on our records and find out just what operation each warehouse might be doing. One or two of them are manufacturing

points and for that reason we had to have certain records separately with each warehouse.

Q. What are those warehouses again, in the St. Louis branch territory?

A. First, it is St. Paul, Omaha, Kansas City, Dallas, New Orleans and, of course, the major distribution from St. Louis.

Q. Now, taking the warehouse at Kansas City, what products did the Kansas City warehouse?

A. White lead in oil, dry white lead and small amounts of oxide.

Q. Of oxide?

A. Yes.

Q. Were mixed paints warehoused there?

A. Now, at that time we were not in the mixed paint business.

Q. How about solder?

A. Solder was carried at Kansas City. That is the metal items. I am speaking only of white lead and 3100 oxide, in my testimony.

Q. What other items other than white lead and oxides were warehoused in Kansas City?

A. White lead in oil, and I believe in 1941 we did have paint. We had pure white lead paint which has been discontinued. I wanted to correct that statement. Then there are certain specialties or painters' supplies that go along with the white lead in oil and linseed oil, lead mixing oil, colors in oil and what we call general painters' supplies, red lead, litharge, red lead, both in kegs and drums. Beyond that met department, I would simply have to give you my knowledge, not too much contact, but the metal end of the business also carried supplies there, some of which were made at Kansas City.

Q. In other words, the Kansas City warehouse, wouldn't it be fair to state, warehoused most all the products sold by the National Lead Company; is that correct?

A. That is correct, I should say.

Q. Well, now, coming back to these entries of cartage expense on white lead in oil, how did the warehouses segregate the cartage expense on white lead in oil from the cartage expense on all the other items?

A. They would have to show the totals at the end of the day of the different departments, and it would show on that classification. White lead in oil has—the records

3101 have always been kept separately from the other items.

Q. Would the cartage expenses on white lead in oil be kept separately from cartage expenses on flatting oil and linseed oil and other related items which, no doubt, would be sold to the same customer in the same shipment?

A. They were, because in our receipts, which you have some place, it showed the different warehouses and it showed the different products.

Q. Well, now, you know, and can testify for a fact, that these, then, are the actual figures on the cartage of white lead in oil as distinguished from any other product in that warehouse?

A. That's correct.

Q. And is not an average or an estimate?

A. They are factual, actual records.

Q. Which have been kept in the regular course of business all the way down the line?

A. That's correct.

Q. Now, how did you derive these figures on the work sheets such as those that appear under: "carloading rate to warehouse," "lcl rate warehouse to customer," "carload rate warehouse to customer," "truckload rate from warehouse to customer," as appear on Respondent's Exhibit 162-A (showing to witness)?

A. The matter of the records was discussed and I recall drawing up on my desk from a sheet of paper the

3102 headings that appear on the top of this page. And that was the form that we used in arriving at these figures.

Q. Just how did you go about getting them? What request did you make of the traffic department? You testified they were made up by the traffic department.

A. The freight rates in all cases were supplied by the traffic department.

Q. I understand that. But now what request did you make of them? In response to what request from you did they give you these figures?

A. The request that we made to them having in mind the tonnage that went into these various towns that we had to designate to the best of our knowledge how that shipment was handled. That is, when the shipment went from our St. Louis warehouse, for example, to the St. Paul warehouse. We used carload shipments as much as

we possibly could to the warehouse. In fact, in all cases, so then we had to analyze in our minds how the shipment was handled.

Q. Who are you talking about "we" now?

A. Those of us in the white lead department. I think there was eight in all that worked on this, including all departments.

Q. Including the traffic department?

A. Including the traffic department. There were three directly from the white lead department. Then we
3103 had to determine just how the shipments originating in St. Louis, going in carloads to the warehouses, and then from there to the customer. And we had to designate, which we did in this column, the carload rate. In this case, St. Louis to Omaha.

Mr. Ewing: What town are you referring to on that exhibit?

The Witness: This happens to be the first town of Council Bluffs, Iowa. Council Bluffs is across the river from Omaha. There are no trucking charges on this classification. It was extended at the rate because we actually got the cartage for a fact in order to determine any additional costs that went in in handling those shipments from the warehouse.

By Mr. Wright:

Q. Now, getting back to my original question, would you summarize for me just what you asked the traffic department to put on this sheet of paper?

A. Yes. While we have a general knowledge of freight rates, there is nothing accurate about it. So I asked the traffic department if they had the records from the year of 1941 and they told me that fortunately they had the tariffs and that changes had been made later than the 1941 tariffs. So that I felt absolutely sure that the freight rates that were put down were the actual freight and the actual records that appeared at that time.

3104 Q. Who was responsible for the so-called routing of the shipments? In other words, to say whether it should appear as being one shipped directly from the factory to the customer or from the warehouse to the customer.

A. The order would originate a good deal in the warehouse territory. An order would come in from any of the

towns. It would go to the warehouse and the warehouse would make the shipment. So, following through on that, the warehouse necessarily had to get the material from St. Louis in order to make the shipments.

Q. Wouldn't it be fair to say, then, that on this routing and on the question of whether the rates that actually appear in these columns would actually have been used in the shipping, that these are estimates based upon your experience as to how those customers would probably have been shipped?

A. I don't—

Q. Would you like that read again?

A. Yes, sir.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Wouldn't it be fair to say, then, that on this routing and on the question of whether the rates that actually appear in these columns would actually have been 3105 used in the shipping, that these are estimates based upon your experience as to how those csutomers would probably have been shipped?")

The Witness: That is correct.

By Mr. Wright:

Q. In other words, this is your best guess in 1947 as to how you routed those shipments in 1941?

A. That is correct. That is the best knowledge that the St. Louis branch could contribute on that job.

Q. But you can't say now that any particular shipment took any particular rate at that time as a specific transaction? You believe now that that is how it would have been shipped, probably?

A. Very few shipments would be made to small towns unless there was an exceptional rate in effect where the lcl rate from St. Louis to that point was lower than the combination of the carload to that warehouse and the lcl from there to the destination. Those we know from past experience over many years, how they are handled. Those are exceptions.

Q. But there are some of those instances?

A. I think so.

Q. Where the lcl rate from the factory to the customer is lower than the combination carload rate to the warehouse plus lcl from warehouse to customer?

A. That's correct.

Q. There may be such instances in here, might there not?

3106 A. I think there are, and I think they are classified the way they were actually shipped.

Q. Do you know for sure whether those were checked that way?

A. They were checked by three different people.

Q. Who checked them?

A. Three in the white lead department. The man in charge of the order department and two young ladies, one that has been with us for 28 years and another one for 20 years.

Q. Is that by people in the traffic department?

A. In the white lead department.

Q. Now, as to these combinations of rates as to which one would be lower. Do you know whether that was checked by the traffic department?

A. All figures were checked by the traffic department.

Q. We are talking now about something that goes beyond the figures, perhaps. There appear to be a good many combination rates here of a carload to warehouse and lcl from warehouse to customer. Do you know whether the traffic department checked all those to determine whether the lcl rate from the factory to the warehouse might not be lower?

A. I don't think so.

Q. You don't think so?

A. No, because we know from past experience in handling the warehouses, the major portion of it.

3107 Q. When you say this was all checked, you are speaking of this whole series of exhibits from 160-A to 164; is that correct?

A. Yes, sir.

Q. You yourself have checked this compilation?

A. I did.

Q. Calling your attention now to Exhibit 160-D, white lead in oil, St. Louis branch, sheet number 1, you come down to this figure in column number 7 of $5,848.01 which is apparently an extension of the freight rate against the pounds shipped to show the estimated freight expense.

A. Yes.

Q. On those transactions?

A. Yes.

Q. The figure below that of $1,334.24 which is plus cartage St. Louis, is added. Will you tell me why the $1,782.18 is deducted?

A. May I look at the next sheet there?

Q. Surely.

A. You have par territory on this sheet. This portion covers Illinois. This portion covers more, and in order to get the correct amount for the par territory, we had to deduct that $1,782. That was a statistical record which Mr. Sargent arrived at in breaking it up to get the par territory.

3108 Q. Wasn't more in par territory?

A. No, sir, it was not.

Q. When you made that deduction there, from what records did you ascertain the extent to which the cartage was in par or in the plus territory?

A. Well, the auditing department had the records, as I said, on the cartage, the drayage.

Q. As to each transaction?

A. They had the sum total of all the records. Those are statistics in the auditing department. We were arriving and working towards sheet number 1 and in order to get this amount correct, we had to separate the one-eighth from the par to take out the drayage that was in there in order to get an accurate record of both par and one-eighth so that they weren't dovetailed together.

Q. Then that $1,700, was that added to your figure on the one-eighth zone?

A. It should have been. It is deducted—pardon me. It was less, so, therefore, it was deducted and put in the one-eighth.

Q. You said you had no invoices. The only record of these transactions which you had were these cards which had been punched from the invoices years ago?

A. On tonnage?

Q. On tonnage.

3109 A. Tonnage only.

Q. So that there were no individual transactions reported?

A. That's correct.

Q. Well, now, how was the auditing department able to separate on a transaction basis the drayage and cartage expenses?

A. That is a simple matter for St. Louis, which includes

Kirkwood, St. Louis, and what we call the metropolitan area. That would have been an easy matter to deduct our freight, or rather, cartage would have been from the St. Louis plant to these points designated here. I am sure that they have that record, without any question.

Q. As to individual transactions?

A. The sum total.

Q. Classified by territories where they delivered it?

A. Yes, that's correct.

Q. In other words, they would set up their cartage accounts to Kirkwood, or such other places as were in the 4th zone as distinguished from those that were in the par zone?

A. That's correct. The reason I feel certain of that is that we have our own system of truckage in the St. Louis plants. That does not exist at the other warehouses. That is public service. So that is an actual record from our books.

3110 Q. Where does this $1,782 figure come from? Would you look at those exhibits and tell me where it comes from (showing to witness)?

A. It is the sum total of the white lead and the dry white lead. It does not include the oxides.

Q. Do you mean to say by that that it is the sum total of the figures on Exhibit 160-B, appearing in the first column under St. Louis?

A. That's correct.

Q. I call your attention to the fact that those first two figures only amount to $1660.78.

A. I can't analyze that further. I asked the same question and they said it was a separation between the 4th and the par and without further checking, I accepted that.

Q. And you do not know how that distinction was made, do you?

A. No.

Q. Was that figure of $1,782 cartage expenses out of the St. Louis warehouse?

A. That's correct.

Q. Direct warehouse expenses of your own trucks, was it?

A. Of our own trucks.

Q. Of your own trucks?

A. Yes.

Q. Anything in the metropolitan area of St. Louis
3111 was par, wasn't it?

A. That's correct.

Q. So that the 1/8th would have had to have been outside of St. Louis?

A. Beyond, I think, the area is 20 miles, approximately.

Q. Beyond 20 miles?

A. Yes.

Q. So that the 1334 would be cartage in the metropolitan area within 20 miles?

A. Yes.

Q. And the 1782 would be beyond 20 miles?

A. That is correct.

3112 Q. Calling your attention now to Exhibit 160-E, Mr. Higgins, get down here to shipments into Iowa from St. Louis. Is that the plant or the warehouse that they are being shipped from now?

A. The plant and the warehouse are both the same thing.

Q. They are in the same establishment?

A. We call it the St. Louis works.

Q. So that when you listed freight rates there from warehouse to customer, that really was from plant or warehouse to the customer?

A. Correct.

Q. Now on your Davenport rate, you will notice it here in the middle of the page of Exhibit 160-E, there are three different figures given, an LCL rate at 43, a car load rate at 26 and a truck load rate of 30¢, but the applicable rate is given as 50¢.

Will you explain that (showing to witness)?

A. There is a fairly good tonnage at Davenport; in my opinion shipments to Davenport would go in truck loads. You might combine four, five or six customers.

Now under the tariff rules, you can ship to one customer. If you have more than one customer they make an additional charge for it. My analysis of Davenport would be that truck loads were shipped to Davenport and very likely a public warehouse handled the distribution.

3113 That will vary from years ago. We got it at 5¢ but it will vary 8, 10 or 12¢. So the analysis of that loads and that whatever the charge may have been for

a truck load rate would represent to the best of our knowledge the cost of getting that material there.

That does not show, by the way, a truck load rate. It shows a car load rate.

Q. Isn't that figure "TL 30," doesn't that represent truck load?

A. That would be the difference, the sum total of the drayage and the public warehousing in handling it.

Q. What drayage are you speaking about, the drayage at the Davenport end?

A. Yes.

Q. I call your attention to the fact that the highest classification which would involve no drayage is LCL; isn't that correct, that would go to the customer with no further drayage to be paid, wouldn't it? That is 43¢.

Yet the applicable rate which was used in deriving the freight cost there was 50¢. The same, I might add, is the case with the one directly below it which is Des Moines where the car load rate is 32½¢, truck load 45¢ and LCL 65¢ and the figure given under total applicable rate upon which you based your calculation is 71¢.

3114 Let me ask you this now, Mr. Higgins: Of that material going to Davenport, nearly a quarter of a million pounds, you can't state on the basis of the cards from which you got that tonnage how much of that might have been in truck load quantities to a single customer or in car load quantities, can you?

A. That was determined by an analysis of going over the accounts as to how the shipments would be made. It is about 62 tons and tonnage of that kind would be handled very likely in truck rates and through the public warehouse.

Mr. Ewing: Is he referring to Davenport or Des Moines?

Mr. Wright: I am referring particularly to Des Moines there where you have got a figure of nearly a quarter of a million or over a hundred tons.

The Witness: Shipments to Des Moines are in various quantities.

By Mr. Wright:

Q. Isn't it possible now as to either Davenport or Des Moines that there might have been one or more car load shipments to a single customer in that period?

A. I don't think so, sir.

Q. Well, you don't know that there weren't, do you?

A. In 1941 I would say there was no car load shipments.

Q. Can you state that as a fact, now, one which
3115 would be within your knowledge and which you are willing to state here on the stand under oath that there were no car load shipments?

A. To the best of my knowledge that is correct.

Q. What I am trying to do is to establish a fact. Now is your answer that you don't know of any or is it your answer that there were none to either Davenport or Des Moines during 1941?

A. I do not recall any car load shipments going to either point during that time.

Q. Well now, could there have been a car load shipment to either of those points that you wouldn't know of?

A. I do not believe so.

Q. Now could there have been a truck load to a single customer?

A. That is correct.

Q. There could have been?

A. Oh, yes, many.

Q. In both places?

A. Yes.

Q. Do you think there probably were truck loads to a single customer?

A. Possibly in the case of one customer, but to my knowledge I have okayed the payment of bills for the public warehouse at Des Moines very, very frequently.

3116 Mr. Wright: I move that that last answer be stricken, your Honor. It wasn't responsive.

Trial Examiner Norwood: Motion allowed.

By Mr. Wright:

Q. Do I understand your testimony to the effect that there could have been and probably were one or more truck loads during 1941 to a single customer in Davenport and Des Moines?

A. That is possible.

Q. So that in that instance the freight applicable would have been the truck load freight rate?

A. That's right.

Q. Of 30¢ in Davenport or 45¢ in Des Moines?

A. That's correct.

Q. Now I call your attention to the sheet marked Exhibit 160-P. There is a transaction there at Corpus Christi, Texas, and in the column headed "No. 1," there is written in there what appears to be Dallas, 120,000 pounds in car load from St. Louis and then following that, car load St. Louis to Corpus Christi, 76¢. And a derivation here, total applicable rate 87¢ a hundredweight.

Will you tell us which of those several figures is the correct one to apply there and why?

A. The total amount given is 131,840 pounds. According to this record there is 120,000 pounds in car load
3117 from St. Louis shipped to Corpus Christi at a rate of 76¢. Those two car loads were shipped to the naval airport at Corpus Christi and the amount is so unusual, it stands out.

The smaller amount, the difference of 11,840 pounds would make up for the balance of the LCL which normally would have been shipped from the Dallas warehouse.

Q. On that 87¢ that was used there, it doesn't represent any actual freight rate, does it?

A. Well, they have a rate from Dallas of 97¢.

Q. Yes.

A. Now add to that, it does not appear but we have a commodity rate to get white lead in oil from St. Louis to Dallas which, at that time, was 48¢ a hundred.

Q. Well now, what I am trying to get at is here that according to this note, 120,000 pounds or well over 90 per cent of that 131,000, were shipped not at the rate which appears in column 5 here of 87¢, but at 76¢.

A. That's correct.

Q. Now where do you get that 11¢ that was added to the rate on that 120 000 pounds? Is that somebody's arithmethical average to determine what you would have to multiply the total poundage by to get this figure in column 7 showing what you think those shipments cost freight-wise?

Mr. Ewing: Would you read that question, please?

(The reporter read the question as follows:

3118 "Q. Now where do you get that 11¢ that was added to the rate on that 120,000? Is that somebody's arithmetical average to determine what you would have to multiply the total poundage by to get this figure in column 7 showing what you think those shipments cost freight-wise?")

The Witness: That is correct, sir.

By Mr. Wright:

Q. Then that 87¢ doesn't represent any actual freight rate or tariff rate at all?

A. To the best of our knowledge it represents the cost of getting that material down to Corpus Christi.

Q. The average cost per hundredweight?

A. I would say it was the actual cost, sir.

Q. Well now, if the car load freight rate was 76¢, where do you get that freight rate of 87¢? That is what I am trying to get at.

A. We have determined the cost of lead in oil first for the remaining portion, to get it from St. Louis down to Dallas which is 48¢ in the car load. Then there was a rate from Dallas to Corpus Christi which, according to this record, is 97¢.

Q. So that then that gave you a total rate combination car load to warehouse and warehouse LCL to Corpus Christi of $1.45 a hundredweight?

3119 A. Yes.

Q. So how did you get the 87¢? You have got $1.45 on one hand and 76¢ on the other and those are the only two official tariff rates that you have?

A. Yes.

Q. So will you tell me the process by which they got that figure of 87¢, if you know?

A. Beyond the rates given I can make no further explanation.

Q. You don't know how that was derived?

A. No.

Q. Now going over here to sheet 160-Q, under San Antonio, there is a statement there under car load rate, under columns 2 and 3 running across there, car load from St. Louis, and then under column 4, there is LCL, $1.53. What is that $1.53? Is that the LCL rate from St. Louis to San Antonio?

A. That is correct, sir.

Trial Examiner Norwood: We will take a five-minute recess at this time.

(A five-minute recess was taken.)

Trial Examiner Norwood: Come to order. Proceed, Mr. Wright.

By Mr. Wright:

Q. Now, Mr. Higgins, going back to Exhibit 160-Q here, the less than car load rate from St. Louis to San Antonio,

$1.53, it is indicated on this that there was a car load
3120 from St. Louis. Yet the applicable freight rate used in figuring was the less than car load rate.

Can you account for that?

A. San Antonio is one of the exceptions that I spoke of in my earlier testimony that a through rate from St. Louis would apply of $1.53. That shipment originated from St. Louis and went through to San Antonio.

Q. It is indicated on here, is it not, that that was in the form of a car load?

A. There is no price in here for the car load. There is no indication at all of a car load shipment.

Q. How do you account for that statement, car load from St. Louis, that appears opposite of San Antonio?

A. This is the LCL rate and that was the rate that they used in making the divisor for the tonnage.

Q. The amount that is included there is approximately a 20-ton car load, isn't it, 80,000 and some odd pounds?

A. A 40-ton car load.

Q. So that that could have been one shipment in a car load then, could it not?

A. I don't believe so.

Q. Well, what does that statement "CL from St. Louis" mean then?

A. There should be no notation of car loads there. The LCL rate applied and it went through at $1.53.

3121 Q. What is that "CL from St. Louis" doing there then? Did you put it in?

A. No, sir.

Q. Who put it in?

A. I don't know.

Q. You don't know what they might have meant when they put it in then, do you?

A. No.

Q. Was your answer no to that question?

A. The answer would be no.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

By Mr. Wright:

Q. How long have you been in the St. Louis branch, Mr. Higgins?

A. From January 1, 1915.

Q. Do you recall ever making any similar study of average costs in the various territories at any other time than the one here that is represented by these documents?

A. I have never made a survey of that kind before.

Q. Do you know of one ever having been made?

A. Not to my knowledge.

Q. Now you stated on direct examination that
3122 those figures on cartage were all expenses paid for automobiles plus their depreciation; is that not correct, when you were figuring cartage?

A. I do not recall making any testimony about automobile charges.

Mr. DuBose: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Wright.

Mr. Wright: I withdraw that statement.

By Mr. Wright:

Q. Now your cartage that is represented here, does that include the cost of the National Lead Company's own vehicles?

A. I am not familiar with the charge off on the automobiles in connection with the actual drayage charges.

Q. Well now, the St Louis branch, the St. Louis plant and warehouse do have their own trucks in some instances, don't they?

A. At our St. Louis lead in oil works where I have control, we have two trucks.

Q. Do those trucks make deliveries to customers?

A. In the metropolitan area.

Q. Just in the metropolitan area?

A. That is correct.

3123 Q. Not to those points in the ½ zone just outside the metropolitan area?

A. That is true.

Q. Those are made by hired carriers?

A. That is right.

Q. So then that figure that you have in here of 1,334.24 cartage in St. Louis which was added to that par thing on Exhibit 160-D would then include the cost of those trucks that you operate yourself?

A. I do not believe that depreciation is included in those figures.

Q. Does it include the cost of cartage in those trucks?
A. No, sir.
Q. It does not?
A. Cartage only, actually.
Q. How did they figure of the cartage in their own trucks, how did they put that in that $1,334?
A. That would cover the cost of the operation of the trucks and the men employed as chauffeurs to drive the trucks.
Q. You know that for a fact, that that is how that is included in that figure or is that your opinion as to how they probably put it together?
A. The figures would have to be assembled in our office, that is correct, sir.
Q. Well now, what did you mean by that answer?
3124 A. That the figures—the auditing department would have to arrive at those figures.
Q. Do you know how they arrived at them, what factors they took into account in arriving at those cartage figures?
A. I don't know the details.
Q. You don't know the details?
A. No.
Q. You don't know from what records they took them?
A. No, sir.
Q. Either as to the outside trucking or as to the cartage expense on your own trucks?
A. If there was any outside trucking handled under emergency shipments, that would be included.
Mr. Wright: Would you read the question and answer, please?
(The reporter read the question and answer as follows:
"Q. Either as to the outside trucking or as to the cartage expense on your own trucks?"
"A. If there was any outside trucking handled under emergency shipments, that would be included.")
Mr. Wright: I don't believe you understood my question.

By Mr. Wright:

Q. What I meant was, do you know exactly what
3125 figures and from what source they took into account in putting together this figure of $1,334 as total cartage? Do you know where they got the figures as to outside cartage that they paid the public carriers? I withdraw that.
Presumably that $1,334 of cartage, St. Louis, contains cartage both expense from the operation of National's own

trucks and cartage which was paid outside carriers in delivering; is that correct?

A. That's correct.

Q. Do you know exactly what figures the auditing department put together to arrive at that $1,335?

A. I cannot give you the details.

Q. I take it that all these figures have been checked and rechecked a number of times so that the only error you know of in them is the one which was pointed out on Exhibit 160-A, under the heading "4" which should have been car load instead of less than car load; is that correct?

A. I believe that is correct. I believe there was one correction on another page but the figure was correct as it was used.

Q. What was that other correction you were speaking of?

A. An error in the extension only.

Q. That has been corrected, has it, on this sheet?

A. Yes, sir.

Mr. Ewing: What sheet is that?

3126 Mr. DuBose: Exhibit 160-A.

By Mr. Wright:

Q. Now getting into the work sheets on dry white lead, Exhibit 162-A to D—that is, Respondents' Exhibit 162-A to D—on 162-C, there is a deduction of $961.30. Will you explain to me what that deduction is?

A. $961.30 is the sum total of drayage from the various warehouses indicated.

Q. Why was that deducted? Was that not a legitimate transportation expense in the par territory?

A. My explanation of that would be that they were trying to break down the actual figure in order to arrive at the sum total on our final sheet of the total amount for each territory.

Q. Well now, you have included cartage in your total as to these other territories when it applied to that territory, have you not? Why did you deduct it as to this particular one?

A. My answer to that would be the breakup, that they were in differential territories.

Q. Now you recall what the par territory is on dry white lead, don't you? I show you this list of points here and ask you to tell me which one of those is outside of the par territory (showing to witness)?

A. They are all outside the par territory.

3127 Q. All of these warehouses, St. Louis, New Orleans, Kansas City, Omaha and St. Paul?

A. That is correct.

Q. Outside the par territory of dry white lead?

A. Dry white lead, that is correct.

Q. What is the par territory for dry white lead?

A. All territories with the exception of Colorado, Wyoming—there is one other state that I do not recall—New Mexico.

Q. Are any of those warehouse points in Colorado, New Mexico or Wyoming?

A. They are not.

Q. They are not?

A. No.

Q. Then they must be in par territory then?

A. The warehouses are all in par territory then for dry white lead.

Q. This particular exhibit here, 162-A to C, is a compilation as to the sales in the par territory, is it not?

I call your attention to the heading "Differential territory par" on Exhibit 162-A. So that I would still like your explanation as to why you deduct cartage expense in the par territory.

A. May I have the work sheet for a moment, please?

Q. This is the work sheet, is it not?

A. There it is (indicating). I cannot identify it

3128 except to state that it has the actual figures for plus cartage in the first paragraph and the second classification is removing at the uniform rate of 10¢ to arrive at a certain figure.

Q. Then they just use the arbitrary figure of 10¢ on cartage on that; is that right?

A. That is correct.

Q. Coming over now to the figures on Exhibit 163-C and D, under the heading on Exhibit 163-C, "Par territory, oxides, LCL lots." On exhibit 163-D, there are several figures on cartage amounting to some $376.22 estimated cartage, Kansas City, Omaha and St. Paul which is deducted from the figure of $4,062.96.

Can you explain how that was deducted and why?

A. I think the same thing applies that we discussed with each of our warehouses, the cost of the drayage, and we had in mind to take 10¢ all over. We found later that we

could, by a process in the auditing department, that we were able to get the actual records.

And I think in this case what they attempted to do was to deduct the 10¢ where they found there was a difference between the two rates.

Q. You say you think that was what they did?

A. I know that is what it is because I was told that the drayage was absolutely correct.

Q. Who told you that?

3129 A. The comptroller of the company.

Q. There is apparently there a figure of a little less than $1,200 which was added to the LCL differential on Exhibit 163-D of $2,878 making a total of $4,062.96. Will you explain to me what these figures below that which total $376.22 represented? If the top figures were actual cartage, why did you, as appears from the note there, deduct "less estimated cartage?"

A. I think they were included by the auditing department in arriving at the total and where they had included the 10¢ and found later that they had the actual drayage charges—

Q. So the, the estimated cartage appearing there should never have been there in the first place?

A. That is correct.

Q. And this other figure under cartage actual was the figure that they represented to you as the actual cartage?

A. That is correct, sir.

Q. But again on this cartage, outside of the fact that the comptroller telling you that those are the actual cartage figures, you don't know what processes he went through to obtain them and to break them down from the other products that might have been involved?

A. I am unable to give you the details on that part of the business.

3130 Q. Now coming to this series of exhibits on par territory, oxides in car loads and car load lots, does this slip attached to this exhibit here describe the par territory?

Mr. DuBose: What is the number?

Mr. Wright: Exhibit 163-A and B.

The Witness: That is correct, par territory.

By Mr. Wright:

Q. That would be Illinois, Iowa, Kansas, Kentucky, Missouri, Minnesota, Nebraska, North and South Dakota, Tennessee and Wisconsin?

A. That is correct.

Q. In what territory is Texas?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: Texas is in the ¼ differential territory.

By Mr. Wright:

Q. Now I call your attention to Exhibit 163-B to the transactions there under the heading "Differential territory par," Dallas, Port Arthur and San Antonio.

A. That is incorrect. That should read "¼ differential car load lots.

Q. Those figures went into the total as under par territory then?

3131 A. Texas is in the ¼¢ differential territory and the only explanation I could offer is that when these sheets, before we left, on account of the detail, that the young lady took the receipts and attached these memorandum in order to make them more convenient to handle.

Texas is in the ¼¢ differential territory definitely.

Q. In the addition and computation in 163-B, the Texas transactions follow Exhibit 163-A. Doesn't that total figure here carry over and make the total for par territory of 11,839,904 pounds?

A. That is correct.

Mr. Wright: I have no further voir dire on this.

Trial Examiner Norwood: Is there any objection to the proffer of the exhibits?

Mr. Wright: I wanted Mr. Ewing to have an opportunity for any further questions he wanted to ask the witness.

Mr. Ewing: Subject to the correction and perhaps further testimony with respect to them, we reoffer these exhibits.

Mr. Wright: I object to the proffer of the exhibits. I think it is plain that exactly what they are. It is a combination of an estimate and secondary record and guess work.

When you examine the details that went into it,
3132 you find the thing is inaccurate. It is in error in a number of very important respects, and it can't be explained by this witness in a number of other very important respects.

I object strenuously to its receipt in evidence being of that character.

Mr. Ewing: I think a substantial portion of the basis

of the objection goes to weight and the reason I mentioned the correction is that if and to the extent there is error, we will correct it. But if we are going to talk about them and have further testimony in connection with them, I think they should be in evidence.

Trial Examiner Norwood: I understand that we had a condition there that the basic data was to be available to the Commission's counsel.

Mr. Wright: That is correct.

Mr. Ewing: I can't make the basic data in the sense of the invoice available because they are not existent. I don't know what other basic data Mr. Wright would have in mind having.

Anything we have got within reason we will be only too glad to make available.

Mr. Wright: I am in this difficulty, that while Mr. Higgins, the witness, thinks he knows what went on in the minds of the people who got some of this material together, he doesn't actually know and these people are not avail-
3133 able to me for cross examination.

Of course, the fact that all humans are frail, we have seen that in these particular exhibits and we have seen that in other exhibits of this sort, and I dislike an important exhibit of this sort to come into the record without my having as much of the available source material as is possible.

I don't believe that these things should be offered until there is further testimony available by the people who prepared them as to just exactly what went into them and what records they got them from. I am going to strenuously object unless that testimony is available.

Mr. Ewing: My suggestion would be that they be received subject to a motion to strike if the errors aren't corrected and if the further testimony with respect to them isn't supplied.

Trial Examiner Norwood: I am at a disadvantage now. This witness, in identifying these papers, made certain statements and told us how he made them and told us the source from which they came. I just didn't memorize it at the time and I can't rule on this motion until I get that record and run through his testimony about the matter, or if you want to give me a resume of the testimony here if you recall it and you can tell me about it, it would probably refresh my memory.

3134 But he made those tabulations, did he?

Mr. Ewing: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. You are excused.

(Witness excused.)

Trial Examiner Norwood: We will recess then at this time until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., the hearing in the above entitled matter was adjourned until 10:00 o'clock a.m., the following day, June 18, 1947.)

3135

Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 18, 1947.

Met, pursuant to adjournment, at 10:00 a.m., EDST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

3136 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment taken on June 17, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y., at 10:00 o'clock a.m., daylight saving time, June 18, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund F. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for Sherwin-Williams Company.

Proceed.

Mr. DuBose: I call Mr. Hesselbrock.

Trial Examiner Norwood: Mr. Reporter, this is Mr. J. H. Hesselbrock, 118 Rosemont Avenue, Fort Thomas, Kentucky.

3137 J. H. HESSELBROCK was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Will you state your full name?

A. J. H. Hesselbrock.

Q. What is your address?

A. 118 Rosemont Avenue, Fort Thomas, Kentucky.

Mr. DuBose: I ask that these sheets be marked Respondents' Exhibit 169-A and the following sub-letters for identification.

Trial Examiner Norwood: It will be marked as Respondents' exhibit 169-A to N inclusive for identification.

(The document referred to was marked Respondents'

Exhibit 169-A, 169-B, 169-C, 169-D, 169-E, 169-F, 169-G, 169-H, 169-I, 169-J, 169-K, 169-L, 169-M, and 169-N for identification.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Hesselbrock, by whom are you employed?

A. The National Lead Company, Cincinnati branch.

Q. In what capacity?

A. As assistant comptroller.

Q. How long have you been so employed?

3138 A. Nineteen years with the company and two years as assistant comptroller.

Q. And prior to being assistant comptroller, what was your employment?

A. Accounting department, in charge of accounting for our Georgia Lead Works Division.

Q. Mr. Hesselbrock, are you familiar with the books of account and records of the Cincinnati branch of the National Lead Company?

A. I am.

Q. Did you in or about the month of March this year receive a request from the home office of the National Lead Company to obtain certain information?

A. We did.

Q. And what did that request ask for, if you recall?

A. The tonnage of white lead in oil shipped into the various differential zones, the freight applying against those shipments, and the average freight charged, and the same information was asked for car load shipments of oxides.

Q. Do you remember for what year?

A. For the year 1941.

Q. And have you prepared that information?

A. That information has been prepared.

Q. And are these sheets, Respondents' Exhibit 169-A to N inclusive for identification, the work sheets and the

3139 summaries setting forth the summary of the information on the work sheets in response to that request from the home office (showing to witness)?

A. They are.

Q. And these records relate to sales of white lead in oil and car load oxides by the Cincinnati branch of the National Lead Company for the year 1941; is that correct, Mr. Hesselbrock?

A. That's correct, sir.

Q. Mr. Hesselbrock, I show you Respondents' Exhibit 169-A for identification and I ask you to state what that represents (showing to witness)?

A. The pounds of sales shown on this exhibit were the total pounds taken from our net sales statement for the year 1941. The oxide covers the same period.

Q. Your first statement related to white lead in oil?

A. White lead in oil, yes.

Q. Now under the heading "Sales heavy and soft paste," that title refers to white lead in oil?

A. That refers to the white lead in oil department as established in our accounting set-up.

Q. That is, of the Cincinnati branch of the National Lead Company?

A. That is of all branches.

Q. These figures relate to the pounds sold by the

3140 Cincinnati branch?

A. Correct.

Q. Opposite the word "par" and under the heading "Total pounds sold" at the top of this exhibit, will you state what that figure 3,000,794 represents?

A. That represents the total pounds of heavy and soft paste sold in par territories.

Q. Par territory for white lead in oil?

A. Yes, sir.

Q. Again, opposite the same statement "par" under the heading "Heavy and soft paste" and under the sub-heading "Total freight and cartage," are the figures $15,424.13. What do those figures mean?

A. That is the exact amount of freight charged against the white lead in oil department in the par zone.

Q. Now is that $15,424.13?

A. Yes, sir.

Q. Opposite the same word "par" under the same general heading and under the sub-heading "Average freight per CWT" is the figure .514. What does that represent?

A. That is the average freight per 100 pounds of white lead in oil sold in par territory and was obtained by dividing the total freight and cartage by the total pounds sold.

Q. In other words, that is 51 4/10c per 100 pounds?

A. Yes.

3141 Q. That was arrived at by dividing 3,000,794 pounds into the figure $15,424.13; is that correct?

A. That's correct.

Q. Again, under the general heading "Heavy and soft paste," opposite the line upon which are the words and figures "par plus ¼" are certain figures. Will you tell us what that entire line represents beginning with the word "par?"

A. That figure represents—the pounds in that column represents the total shipments as determined by an analysis of the individual invoices to customers in the par plus ¼ zone. The freight and cartage was obtained by analyzing the expense account vouchers chargeable to freight and cartage, soft and heavy paste, applying against the par ¼ zone.

The average of .769 was obtained by dividing the total freight and cartage by the total pounds sold in that zone.

Q. Now the figure of .769 is 76 9/10¢ per hundredweight?

A. Right.

Q. And was arrived at by dividing the $2,353.56, the total freight and cartage by 306,037½ pounds; is that correct, sir?

A. That is correct.

Q. And opposite the words and figures "par plus ⅜" are certain figures. Will you tell us what those represent sir?

3142 A. Those figures represent the total pounds sold into the par plus ⅜ zone, the freight and cartage applying against those shipments and the average freight per hundredweight which was obtained, .937 per hundredweight which was obtained by dividing the total freight and cartage by the total pounds sold in that territory.

Q. Now under the general heading "1941 sales of oxides in car load lots," will you tell us what those words and figures represent (showing to witness)? On both lines following that general heading.

In all instances the invoices were analyzed to find exactly what shipments went into the par zone and the par plus ¼ zone. The freight was obtained from vouchers and freight rates.

The total freight was divided by the total number of pounds to obtain the average freight per hundredweight.

Q. And on the first line are the total pounds sold of oxides in car load lots in par territory with the total freight and cartage applicable there plus the average freight per hundredweight in par territory; is that correct?

A. That is correct.

Q. And the second line represents similar figures for the par plus ¼ oxide zone?

A. Correct.

Q. For car load lots?

3143 A. Yes, sir.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

By Mr. DuBose:

Q. I show you Respondents' Exhibit 169-B for identification and I direct your attention to the statement in the left-hand column about one-third of the way down that column, the heading "Total sales," and underneath that the figure of 3,767,336 and ask you what that figure represents, Mr. Hesselbrock?

A. That figure represents the total sales of soft and heavy paste during the year 1941 as shown on our net sales statement.

Q. That is by the Cincinnati branch?

A. By the Cincinnati branch, yes.

Q. Is that a record kept in the ordinary course of business?

A. It is our standard procedure.

Q. And is it divided showing sales by years?

A. Each year is kept separately and this was a sales statement for the year 1941.

Q. So from that you are able to determine that the Cincinnati branch in 1941 sold 3,767,336 pounds of white lead in oil for that year; is that correct?

3144 A. That is correct.

Q. Just below that and in the same column is the word "freight," and underneath that is the figure of 22,093.89. Will you tell us what that word and those figures represent, sir?

A. The word "freight" represents the total freight and cartage expense chargeable against the white lead in oil department for the same year 1941 for the Cincinnati branch.

Q. And that is $22,093.89?

A. Correct.

Q. Where did you obtain that figure?

A. From our expense statements as regularly calculated. That is a standard report.

Q. Was that in the same statement that you obtained this poundage from?

A. Well, it is a separate statement but it pertains to the same business.

Q. It is a separate book or record, however?

A. It is a separate record entirely.

Q. Coming to the second, third and fourth columns on this same exhibit, will you tell us what they represent and from what records you obtained that information (showing to witness)?

A. In the second column that represents a recap of our sales into the Tennessee and Virginia territories
3145 which are listed as zone par plus ¼.

Q. Is that by pounds?

A. In pounds; yes, sir. These were obtained by analyzing each invoice for shipment into that territory for the year 1941.

Q. Now how did you obtain those invoices?

A. Well, we took all of the invoices for the year 1941 and broke them down into zone par plus ¼ and zone par plus ⅜ and analyzed the individual shipments that went into those zones and took the par territory by difference.

Q. In other words, you obtained the pounds sold in par plus ¼ and par plus ⅜ zone respectively, and the total of that is listed here for the par plus ¼ zone of 3,306,370½ pounds; is that correct?

A. That is correct.

Q. To that you added the pounds sold in the par plus ⅜ zone which is 460,505 pounds?

A. Right.

Q. And the total of those figures you subtracted from this figure in the left-hand column under the heading "Total sales," 3,767,336?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

3146 Mr. DuBose: I will rephrase that question.

By Mr. DuBose:

Q. The total pounds under the heading "Tennessee and Virginia, par plus ¼" were added to the total pounds under Alabama, Georgia, North Carolina and South Carolina, par

plus ⅜ and those two figures were subtracted from the pounds shown under the heading in the left-hand column, "Total sales" to arrive at the pounds sold in the par territory; is that correct?

A. That is correct.

Q. Now opposite the word "freight" are certain figures under the heading "par plus ¼, par plus ⅜ and par." Will you tell us what those figures represent and from what source you obtained them?

A. These figures were obtained from an analysis of our expense account.

Q. What do they represent?

A. Par plus ¼ was added to the par plus ⅜ territories and subtracted from the total freight charged against the white lead in oil department to obtain the freight and cartage charged in par territory.

Q. Now these figures represent dollars and cents of freight and cartage; is that correct?

A. Correct.

Q. And the total of the freight figures under the 3147 par plus ¼ were added to the total of the figures under par plus ⅜ and the sum of those was subtracted from the figure in the left-hand column under the heading "freight" to arrive at the applicable freight and cartage charge for par territory which is in the last or fourth column under the heading "par"; is that correct?

A. That is correct.

Q. Underneath that line and opposite the words "ACGE rate," are certain figures. What do those represent?

A. Those represent the averages in each territory, in each zone.

Q. The average what?

A. The average freight rate in each zone.

Q. Per what?

A. Per hundredweight.

Q. So that the three figures there under the second, third and fourth columns represent respectively the average freight per hundredweight for white lead in oil shipments from the Cincinnati branch for 1941 in par plus ¼, par plus ⅜ and par zones; is that correct?

A. That is correct.

Q. Where were those freight figures under the heading "par plus ¼" and "par plus ⅜" obtained?

A. They were obtained by analyzing individual vouchers which had been charged to the white lead in oil ex-
3148 pense, freight cartage expense account, for par plus ½ zone and par plus ¾ zone. The sum of the freight charged against these two zones was subtracted from the total freight to obtain the freight and cartage in the par zone.

Q. Now I show you Respondents' Exhibit 169-D and E for identification and ask you what those sheets represent (showing to witness)?

A. Exhibits 169-D and 169-E represent the voucher numbers on which freight was charged to the white lead in oil department.

Q. Are those all the vouchers for sales in 1941?

A. They are all the vouchers for sales in 1941.

Q. And from those vouchers, you sorted out the vouchers dealing with shipments to the differential territories; is that correct?

A. That is correct.

Q. And from those differential territory vouchers, you obtained the actual freight figures shown on this Exhibit, Respondents' Exhibit 169-B for identification?

A. That is correct.

Q. Now getting back to Respondents' Exhibit 169-B for identification, under the heading "Sales WLO 1941" there are certain words and certain figures. Without reading the figures through will you tell us what they represent and what those words represent?

3149 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: We attempted to give here an estimate of the sales which were made through agents and the other sales to industrialists and other customers.

By Mr. DuBose:

Q. Now you say an estimate. Where did you obtain those figures?

A. Our 1940 and 1941 sales statements contain a breakdown of the total sales sold through agents.

Q. Well then, the figure opposite the words "Through agents" which begins with the numeral 3, was obtained from books of the Cincinnati branch kept in the regular course of business, were they not?

A. That's right.

Q. Was that the same record from which you obtained the pounds under the heading "Total sales"?

A. The same record, the net sales statement.

Q. And that record does actually show the number of pounds which were sold through agents; is that correct?

A. That's correct.

Q. And you were able to obtain that for the two years, 1940 and 1941?

A. That is correct.

3150 Q. As this exhibit shows?

A. Correct.

Q. So it is not just an estimate, is it, Mr. Hesselbrock?

A. No, sir. It is based on actual figures for those two years.

Q. Now there are certain percentage figures opposite the figures which show the pounds sold through agents or to others. Will you tell us what those percentage figures represent?

A. Assuming the total sales as 100 per cent, the sales through agents represent 89.49 per cent. This was obtained by dividing the sales through agents by the total sales in pounds.

Q. That is shown for both 1941 and 1940 there; is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 169-C for identification and ask you to state what this sheet represents (showing to witness)?

A. This sheet is an accumulation of the breakdown of freight to par plus ¼ zone and par plus ⅜ zone as detailed on other work papers.

Q. And are the totals under the respective headings "par plus ¼" and "par plus ⅜ and par" on Respondents' Exhibit 169-C for identification the same as the cor-
3151 responding figures under the same headings opposite the word "freight" on Respondents' Exhibit 169-B for identification?

A. They are.

Q. In the left-hand column under the heading which is on Respondents' Exhibit 169-C for identification, the heading "No. 22 cartage and freight 1941" are certain figures. Will you tell us what the figures under that heading represent and from what source you obtained them?

A. The number 22 represents the number of the expense account in our cost system. Freight and cartage is the name of the account. The total dollars represent the total freight and cartage chargeable against the white lead in oil department for the year 1941.

Q. I show you these work sheets which have been marked Respondents' Exhibit 169-F to J inclusive for identification and I ask you to tell us what they represent? You might look at all of them first.

A. The exhibits No. 169-F through 169-J represent the analysis of individual invoices.

Q. What do they show?

A. They show those shipments which went into par plus ¼ territory and par plus ⅜ territory.

Q. Do they relate to pounds or to freight?

A. Pounds only.

Q. So these sheets are the work sheets showing
3152 the pound or pounds of white lead in oil sold in the differential territory served by the Cincinnati branch for the year 1941 which were obtained from actual invoices; is that correct, sir?

A. That's correct.

Q. And the totals of these pages, Respondents' Exhibit 169-F through J inclusive for identification are set forth on both Respondents' Exhibit 169-A and 169-B for identification, are they not?

A. They are set forth on Exhibit 169-B for accumulation and the totals transferred to Exhibit 169-A.

Q. In other words, the figures on Respondents' Exhibit 169-B for identification at the top of the page represent the page-by-page totals set forth on these documents, Respondents' Exhibit 169-F, to 169-J inclusive; is that correct?

A. That is correct.

Q. I show you Respondents' Exhibit 169-K to M inclusive for identification and I ask you what these three sheets represent (showing to witness)?

A. The schedules, Exhibit 169-K to 169-M represent an accumulation of individual items of freight charged against par plus ¼ zone and the par plus ⅜ zone.

Q. And where were those figures obtained?

A. They were obtained from the vouchers on which the freight was originally paid.

3153 Q. And are the totals appearing on Respondents' Exhibit 169-K, L and M for identification the figures which appear on Respondents' Exhibit 169-C for identification?

A. Yes, sir.

Q. And then the grand total of these figures which appear on Respondents' Exhibit 169-C for identification appear opposite the word "freight" and under the particular heading on Respondents' Exhibit 169-B for identification?

A. That is true.

Q. I show you Respondents' Exhibit 169-N for identification and I ask you to state what that represents (showing to witness)?

A. It represents the total sales of oxides in car load lots, pounds and freight.

Q. What territories?

A. Par plus ¼ and par territories.

Q. And that includes, you say, both pounds and freight in dollars and cents?

A. That is correct.

Q. And from what source were those figures, both as to pounds and freight rates, obtained?

A. The pounds were obtained from actual invoices covering sales in those particular territories. In the case of par plus ¼ and the state of Tennessee, the freight rate was applied against the total pounds.

3154 Q. Now taking the heading "par plus ¼, Alabama" on this Respondents' Exhibit 169-N for identification and the first column on the left-hand side, will you state what the words "St. L. to Birmingham, Alabama" mean?

A. It means these shipments went forward from our St. Louis branch to customers in Birmingham, Alabama.

Q. There is no oxide plant in Cincinnati, is there, Mr. Hesselbrock?

A. No.

Q. When Cincinnati obtained an order for a car load from a customer in Birmingham, Alabama, from what plant was that material shipped?

A. St. Louis.

Q. To whom was the freight on that shipment from St. Louis charged?

A. It was charged to the Cincinnati branch.

Q. By inter-branch vouchers?

A. Yes, sir.

Q. And from those vouchers you are able to ascertain that there were only these five car load shipments to par plus ¼ oxide territory so far as car load lots are concerned; is that correct?

A. Not from the vouchers but from the invoices.

Q. From the invoices?

A. Yes, sir.

3155 Q. Is there any difference?

A. No, because one would apply against the other. However, in the case of Alabama the freight rate was applied against the total weight of the shipment.

Q. In other words, under the heading "Freight rate," the figure 52 encircled is the car load freight rate for oxides from St. Louis to Birmingham; is that correct?

A. That is correct.

Q. And the total pounds sold by the Cincinnati branch in the par plus ¼ territory and shipped from St. Louis was simply multiplied by this rate of 52¢ per 100 pounds to arrive at the total freight applicable against these shipments; is that correct?

A. That is correct.

Q. Now under the heading "par, Tennessee," will you tell us what the column on the left represents?

A. It represents the weight in pounds as determined by an analysis of our invoices for shipments during the year 1941 into the Tennessee area or the Tennessee territory.

Q. That is for oxides in car load lots?

A. Oxides in car load lots only.

Q. Now under the same heading, what does the column on the right represent?

A. It represents actual freight paid.

Q. From what source was that obtained?

3156 A. That was obtained from the invoices of the branch.

Q. Now under the third general sub-heading on this exhibit, Respondents' Exhibit 169-N for identification, is the word "par." Will you tell us what that word means?

A. The word "par" means that that was shipments into the par zone.

Q. Other than Tennessee; is that correct?

A Other than Tennessee; yes, sir.

Q. Now under that heading "par" are two columns. Will you tell us what the left-hand column represents?

A. The left-hand column represents the weight of the shipments as determined by an analysis of the invoices.

Q. And will you tell us what the right-hand column represents?

A. It represents the freight actually charged against those invoices.

Q. Was that shown on the invoices themselves?

A. Yes, it would be.

Q. Now in case the Cincinnati branch obtained an order for a car load lot of oxides, from what shipping point would those oxides be shipped?

Mr. Wright: Objection, your Honor. That is going into the contents of the document rather than any characterization or identification. It is not yet in evidence.

3157 Mr. DuBose: I am simply trying to show how these figures are arrived at.

Trial Examiner Norwood: Read the question, please.

(The reporter read the question as follows:

"Q. Now in case the Cincinnati branch obtained an order for a car load lot of oxides, from what shipping point would those oxides be shipped?")

Trial Examiner Norwood: I think he can answer that irrespective of the exhibit. He can bring that out.

Objection overruled.

The Witness: Well, that is a question which I cannot answer because I do not handle the routing of any orders.

By Mr. Du Bose:

Q. Do you know whether that would be shipped from Cincinnati?

A. In no case.

Q. Do you know from what possible points it might be shipped other than Cincinnati?

A. It would or could be shipped from our St. Louis branch, from our Chicago branch, from our Philadelphia branch. That is all.

Q. When they were shipped—and I take it then that all of these car load shipments in par Tennessee and in par territory which you have listed there—they were

3158 not shipped from Cincinnati; is that correct?

A. No shipments listed were made from Cincinnati.

Q. They were all made from other branches of the National Lead Company; is that correct?

A. That is correct.

Q. Now did these other branches in each instance bill the Cincinnati branch for the freight charges?

A. Yes, sir.

Q. Was it from those inter-bills or invoices that you obtained these freight figures?

A. Yes, sir.

Q. And are the totals on this exhibit, Respondents' Exhibit 169-N for identification, as to both pounds and freight, the totals which appear under the heading "1941 sales of oxides in CL lots, on Respondents' Exhibit 169-A for identification?

A. They are.

Q. Mr. Hesselbrock, were these records, Respondents' Exhibit 169-A to N inclusive for identification prepared by you or under your direction?

A. They were.

Q. And did you check the totals and the work sheets and the figures thereon?

A. Not personally in all cases.

Q. Some others worked with you on the individ-
3159 ual invoices; is that correct?

A. Right.

Q. Who prepared the totals which are listed on Respondents' Exhibit 169-A and B and C for identification (showing to witness)?

A. I prepared the totals on Exhibit 169-A. The totals on Exhibit 169-B and 169-C were prepared by an assistant in the accounting department.

Q. Who was working under your direction?

A. Under my direction; yes, sir.

Mr. DuBose: I offer in evidence Respondents' Exhibit 169-A to N inclusive for identification.

Mr. Wright: I object to the receipt of these documents in evidence, your Honor. There is no basic data available here from which it can be ascertained what these figures represent.

An examination of this witness, since I have not yet seen these papers, is completely unintelligible to me and there are no records of any sort from which we can check here the method by which these things were prepared and what they represent.

Mr. DuBose: Your Honor, there has been just about as complete an identification as possible. This man obtained these figures from actual invoices, actual company records. We haven't these records with us, of course.

3160 Trial Examiner Norwood. Those records are in existence, are they?

The Witness: They are in existence.

Trial Examiner Norwood: Where are they?

The Witness: In Cincinnati.

Mr. Du Bose: And they will be made available.

Trial Examiner Norwood: They will be made available to the Commission's accountants?

Mr. Du Bose: At any time.

Trial Examiner Norwood: And at such time will you go over it with the Commission's accountant so as to show him the source in each case and so on, so that they may check these documents completely?

The Witness: If I am directed to do so by my superior.

Trial Examiner Norwood: I should have asked that with regard to counsel.

Mr. Du Bose: Yes, your Honor.

Mr. Wright: I object to putting that in in this fashion. When the Commission prepared similar tabulations the work sheets were made from the records in the possession of these companies and they were left with the company's accountants and they were checked over and worked out, so when it came time to consider the question of putting them in evidence, both sides knew what they were.

3161 Here are documents which I have never seen before and which are thrown at me in this fashion and by a ruling permitting them to go in subject to a ruling of basic documents, I am put to the burden and the Commission is put to the burden of going through the books and records of all these branch offices here to determine whether or not these things were properly made, and I don't think that is proper.

Trial Examiner Norwood: The Commission has a very expert and capable force maintained for just that purpose, and I should think that they would prefer examining this data in the office there and with this expert here to show them what it is.

It would be more satisfactory than bringing some of the stuff here to New York, and you would be inquiring

about other material and it would be in Cincinnati. We receive this kind of information that is being offered here all the time in these cases.

Mr. Wright: My objection is to the receipt of it in evidence before we have had an opportunity. I mean to receive such secondary evidence as this, it is necessary to have some agreement of counsel ordinarily if we follow the rules on the matter.

Certainly I haven't been approached on that problem and I have had no opportunity of examining this material.

Trial Examiner Norwood: Counsel has said that
3162 he has agreed to make all this material available to the Commission. Now if I receive it, I am going to receive it under that condition.

Mr. Wright: Your Honor, I would suggest rather than admitting it subject to a motion to strike on the basis of our doing that, that you defer a ruling on the admission of the documents until we have had an opportunity of examining the basic data, in which case I may be able to withdraw my objection.

Trial Examiner Norwood: I think inasmuch as the data is as shown here that I will overrule the objection and receive these exhibits in evidence subject to the conditions here that the counsel make these completely available to the Commission and the Commission's experts.

Mr. Wright: Your Honor, I would like to suggest also as a part of that, that I be given an opportunity of deferred cross-examination of this witness with regard to these exhibits.

Trial Examiner Norwood: You may call him for further cross-examination.

Mr. Wright: Is it understood that he will be available to me for further cross-examination on this as part of the admissibility of these documents?

Mr. Du Bose: Certainly.

Trial Examiner Norwood: Yes.

3163 Mr. Du Bose: We will also have photostats of these made and substitute photostatic copies thereof.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 169-A to N inclusive.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 169-A, 169 B, 169-C, 169-D, 169-E, 169-F, 169-G, 169-H, 169-I, 169-J, 169-K, 169-L, 169-M and 169-N, was received in evidence.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. We will take a five-minute recess at this time.

(A five-minute recess was taken.)

3164 Trial Examiner Norwood: Come to order. Proceed.

Mr. Wright: I would like to request a further cross-examination of this witness.

Mr. Du Bose: That is perfectly satisfactory.

Trial Examiner Norwood: Have you had all the direct you want on these documents?

Mr. Du Bose: Yes, sir.

Trial Examiner Norwood: Are there any further explanations that you would like to bring out?

Mr. Du Bose: Not at this time, although there might be more on the cross-examination.

Trial Examiner Norwood: The witness is excused, to be recalled at some future time, and the counsel for the National Lead Company undertakes to produce him for said examination.

Mr. Du Bose: Yes, sir.

(Witness excused.)

Trial Examiner Norwood: Proceed, Mr. Du Bose.

Mr. Du Bose: I call Edward L. Baum.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Edward L. Baum, 711 9 Shore Road, Brooklyn, New York.

EDWARD L. BAUM was thereupon sworn as a witness on behalf of the company and, having been first duly sworn, testified as follows:

3165 *Direct Examination by Mr. DuBose.*

Q. What is your full name?

A. Edward L. Baum.

Q. What is your address?

A. No. 711 9 Shore Road, Brooklyn, New York.

Q. Mr. Baum, by whom are you employed?

A. I am employed by the National Lead Company, Atlantic Branch, New York City.

Q. No. 111 Broadway, New York City?

A. Yes.
Q. In what capacity?
A. I am assistant to the controller.
Q. And how long have you been so employed?
A. About 12 years in that capacity, 30 years with the company.
Q. And prior to being assistant controller, what were your duties?
A. Well, I was cashier for 2 years and travelling auditor for 2 years before that, and office manager in the National Lead Company crooke works in Brooklyn.
Q. In 1941, you were assistant controller?
A. Assistant to the controller.
Q. Assistant to the controller?
A. Yes, sir.
3166 Q. And you are familiar with the books, records, and books of account of the Atlantic Branch of the National Lead Company for the year 1941?
A. Yes, sir.
Mr. Du Bose: I ask that these two sheets be marked Respondent's Exhibit 170-A and B for identification.
Trial Examiner Norwood: They will be marked Respondent's Exhibits 170-A and B for identification.
(Whereupon, the documents referred to were marked Respondent's Exhibits 170-A and 170-B for identification.)

Trial Examiner Norwood: Proceed, Mr. Du Bose.
By Mr. Du Bose:

Q. Mr. Baum, I show you Respondent's Exhibit 170-A for identification and ask you to tell us what that record represents (showing to witness)?
A. This represents a record of the total sales of our heavy and soft paste white lead in oil in the year 1931.
Q. What year?
A. Pardon me, in the year 1941. That is broken down into the apportion of that total which was shipped to par zone and also the portion which went to the plus $\frac{3}{8}$ths zone. It further records the total freight and cartage applicable to the shipments in those two zones. An arithmetical calculation was then made which gives the average cost per hundredweight freight and cartage for those two zones.
3167 Q. Is that with reference to sales by the Atlantic Branch only?

A. Yes, sir. It also shows a summary or a total of our oxides department sales for the branch only, and the freight and cartage paid by the branch applicable there which was again averaged out through an arithmetical calculation to show the average freight and cartage cost per hundredweight of oxides shipped.

Q. That shows only par shipments?

A. It does. It shows only par shipments because an analysis of the records disclosed that there were no shipments other than par from the Atlantic Branch.

Q. Now, I show you Respondent's Exhibit 170-B for identification and I ask you whether this is the work sheet from which the totals under the heading "heavy and soft paste white lead" were taken as shown on Respondent's Exhibit 170-A for identification?

A. I would answer that by stating that this exhibit, Respondent's Exhibit 170-B, is the work sheet from which the totals shown for shipments to the plus 3/8ths zone were derived.

Q. And that does not show—

A. That does not show the grand total for the total shipments of the Atlantic Branch.

Q. Now, I notice on Respondent's Exhibit 170-A 3168 for identification under the heading "heavy and soft paste white lead" and under the sub heading "total pounds sold" at the bottom of that column a figure, and I ask you to state what that figure is beginning with the numerals 19.

A. That figure is the total sales of heavy and soft paste white lead by the Atlantic Branch in the year 1941 to our customers, stated in pounds.

Q. From what source was that figure which appears at the bottom of that column on Respondent's Exhibit 170-A for identification taken?

A. That figure was taken from the sales accounting record of the heavy and soft paste white lead sales for the year 1941.

Q. Is that a record kept in the ordinary course of business by the Atlantic Branch?

A. That is. That is our regular standard procedure. I took that figure from that record.

Q. Now, going to Respondent's Exhibit 170-B for identification, opposite the heading "Florida" the second column, the heading "in pounds," or "in lbs." underneath

that heading are certain figures. Will you tell us what those figures in that second column represent?

A. Well, these figures represent the portion of the total sales referred to a moment ago that the point of destination of our shipments being in the State of Florida
3169 and identified by the several cities therein.

Q. Now, do these figures under that second column under the heading "in pounds" represent the pounds of white lead in oil sold by the Atlantic Branch to customers in these particular named towns in Florida and Georgia?

A. Yes, sir, they do.

Q. And do those represent all of the sales of white lead in oil in the 3/8ths zone by the Atlantic Branch for the year 1941?

A. Yes, sir, they do.

Q. Now, from what records were these figures showing the pounds, sold to customer in particular cities obtained? What records of the Atlantic Branch?

A. Well, these figures were taken from our sales analitical records which are checked periodically, I might say daily, with the sales accounting records. The only difference being that the sales accounting record is in total and the sales analytical records represent tabulations taken from the same source by point of destination.

Q. Now, you say sales analytical records. In what form are those records kept?

A. These records are kept on a visible card system analysis.

Q. And are those cards kept town by town?

A. They are.

Q. For the 3/8ths territory; is that correct?

3170 A. Well, by inference, yes. It is kept town by town by Florida and Georgia, which happens to be a 3/8ths territory.

Q. So that they show all the sales by towns of the Atlantic Branch for the year 1941 in Florida and Georgia?

A. Yes, sir, they do.

Q. And Florida and Georgia are the only two states served by the Atlantic Branch for white lead in oil; is that correct, in 1941?

A. No. The only two states served in the 3/8ths zone, yes, sir, that's correct.

Q. Now, taking as an example the first town listed

under the heading "Florida," the town of Daytona, the figure in the second column you have testified, I believe, represents the pounds of white lead in oil sold by the Atlantic Branch in 1941 to customers in that town of Daytona, Florida; is that correct?

A. That's correct, net weight.

Q. Net weight?

A. Yes.

Q. The third column "revised rates, lcl" has a figure opposite the town Daytona. Will you tell us what that figure represents?

A. Well, that figure represents the lcl rate, the minimum lcl rate from point of shipment to point of destination.

Q. Point of shipment from the Atlantic Branch?

3171 A. From the Atlantic Branch point of shipment to the point of destination being Daytona in this case.

Q. Now, under the fifth column under the heading "gross wt." is a figure opposite the town Daytona. Will you tell us what that figure represents?

A. Well, inasmuch as we do not record the gross weight of every shipment in summary form for sales record purposes, we felt that for this presentation we should add six per cent to the net weight to approximate what was considered to be the gross weight of these shipments to Georgia and Florida.

Q. In other words, the shipping weight of material is in excess of the actual pounds of the material sold; is that correct?

A. That's correct.

Q. And to arrive at that shipping weight you added six per cent to the pounds of material sold; is that correct?

A. Yes, sir.

Q. Now, under the next column under the heading "CL" is the figure .68 opposite the town Daytona. Will you tell us what that is?

A. Well, that represents the carload rate for white lead in oil shipments originating in Brooklyn and having a destination of Daytona, Florida.

Q. Under the next heading "carload weight," there is a figure opposite Daytona. Will you tell us what that

3172 represents?

A. That represents the minimum carload weight that pertains to that rate for shipments to Daytona, Florida.

Q. In other words, in order to obtain a carload rate for a shipment to Daytona, you would have to ship at least that much or that many pounds; is that correct?

A. Yes, sir.

Q. Now, under the next column is a heading which I wish you would read for us (showing to witness).

A. That says revised calculation. These totals—well, that is what it says.

Q. Revised calculation?

A. Yes.

Q. Now, underneath that, opposite the town Daytona, is a figure. Will you tell us what that represents?

A. This column referred to represents the cost of shipping the quantity specified calculated at the lcl rate to the point of destination indicated on each line at the respective rates and includes a local cartage to the carrier. That is to say, from our point of shipment in Brooklyn to the carrier.

Q. Arithmetically, what is that figure opposite Daytona, Florida, under the heading "revised calculation"?

A. Well, using Daytona to illustrate, the gross weight shipped to Daytona multiplied by the lcl rate to Daytona—

Q. That being in the third column?

3173 A. In the second column.

Q. In the second column?

A. I stand corrected. That is the third column.

Q. Under what heading?

A. Under the heading "lcl." That rate plus the average local cartage cost would equal the amount I have just referred to, which shows in this column marked—shall I read it?

Q. Revised calculation?

A. Revised calculation based on actual weights.

Q. Now, I call your attention to the next column headed "freight gross weight calculated on carload rates" and to a figure opposite the word Daytona and ask you what that figure represents?

A. Using the same gross weight shipped to Daytona, but applying the carload rate previously referred to, pertaining to Daytona, the multiplication was made and that figure indicates the extension or the cost thereof.

Q. In other words, that figure under the heading "freight gross weight calculated on carload rates" is the gross weight multiplied by the carload rate to Daytona; is that right?

A. That's correct.

Q. I call your attention to the last column on the right under the heading "calculation based on one carload shipment to each point of destination," and ask you to

3174 what that refers?

A. That calculation, again using Daytona to illustrate, represents the cost of one carload shipment of white-lead in oil to Daytona, Florida, calculated at the carload rate.

Q. Is that calculated on the minimum carload weight applicable to shipments to Daytona?

A. Yes, sir.

Q. Now, the figures under the same columns opposite the other towns in Florida and in Georgia were all arrived at by similar calculation; is that right?

A. Yes, sir.

Q. Going back to the heading in the third column "revised rates lcl," will you tell us where those figures were obtained?

A. Well, all of these rates were checked through our traffic department.

Q. Is that the general office traffic department?

A. Yes, sir, the general office traffic department of the company.

Q. And you asked them for the applicable lcl rates to these towns from either Brooklyn or New York, as the case might be, and they gave you those figures; is that correct?

A. That's correct. And in the case of the notation, "revised rates"—to explain the notation "revised rates," when checking the original calculation, errors were

3175 noted and accordingly the revised or correct rates were recorded and these calculations are all made on these so-called revised rates.

Q. Just to the right of the revised rate lcl is a statement "original state," with figures underneath that for particular towns. Do I then take it you mean that where the original rate was not corrected, you found that that was correct?

A. That is a correct statement.

Q. But in either case, it is the lcl rate?

A. Yes, sir, in either case.

Q. Now, under the fifth column, the fifth general column under the heading "CL" are certain figures opposite each town. Will you tell us what those figures are and from what source you obtained them?

A. Those figures represent the carload rates to the respective points of destination and were checked through the company traffic department.

Q. You obtained those rates from the same source as the lcl rates?

A. Yes, sir.

Q. Now, going back to Respondent's Exhibit 170-A for identification, under the heading "heavy and soft paste white lead," the second column entitled "total freight and cartage" has at the bottom thereof a figure. What
3176 does that figure represent?

A. That figure is taken from our expense accounting records which tell us how much freight and cartage expense was chargeable to the heavy and soft paste white lead department of the branch for the year 1941, the shipments to customers.

Q. Now, you say "our records." Whose records are those?

A. The branch records.

Q. And in what form are those records kept?

A. Well, they are bound. They are pencilled records bound in book form.

Q. And they show total freight and cartage paid by the Atlantic Branch in connection with sales of white lead in oil for the year 1941; is that correct?

A. Yes, sir.

Q. Now, going back to Respondent's Exhibit 170-B for identification again, at the bottom of the second column entitled "in pounds," is a figure. Is that figure the total pounds of white lead in oil sold by the Atlantic Branch in 1941 for Florida and Georgia?

A. Yes, sir.

Q. Then under the heading in the forth column "gross weight," is a figure. What does that represent?

A. That represents the net—the total net weight just referred to increased by six per cent. In other words,
3177 106 per cent of the figure in the second column which we estimate to be the weight of the material shipped to Georgia and Florida in 1941.

Q. In other words, the figure, the total of the gross weight, represents 106 per cent of the weight of the material actually sold which in your opinion was a correct estimation of the shipping weight of that material; is that correct?

A. I would say it is the best estimation of the actual material billed in Georgia and Florida.

Q. Upon what factors did you base that estimate or what factors did you consider in arriving at your estimate of the shipping weight as being 106 per cent of the net weight of material sold?

A. Well, the company sells this material in various sized packages which, of course, represent the tare weight.

Q. What do you mean by that?

A. That is the weight of the package in which the material is sold.

Trial Examiner Norwood: That is exclusive of the container?

The Witness: In the case of white lead in oil, they usually ship the container in the package. They don't in other words, box it in the sizes that we ship to Georgia and Florida.

3178 Trial Examiner Norwood: Doesn't that six per cent take care of the weight of the container?

The Witness: Yes, sir. I said package, but it is really a container.

By Mr. DuBose:

Q. Under the sixth column, the heading "revised calculation, amount" and at the bottom of that column there is a figure. Will you tell us what that total figure represents?

A. The figure referred to represents the total amount of freight and cartage expense calculated on the actual weights shipped on the basis of the lcl rates. I would like to correct that. Based upon the rate applying to the particular points of destination.

Q. What rate?

A. The lcl rate.

Q. So that this total under the column headed "revised calculation, amount" represents the total of the freight and cartage for shipments of white lead in oil in 1941 calculated by multiplying the actual weight shipped town by town as increased by six per cent to approximate shipping weight, and as multiplied by the particular lcl rate applicable to that particular town, and represents, rather, the total of all the shipments to these particular towns calculated in that fashion; is that correct?

A. It is correct, with the exception that we also include

the local cartage cost to the carrier from the point of
3179 shipment.

Q. Where is that shown?

A. That is shown up here at the top of the column.

Q. What is that average cartage?

A. That average cartage cost is .0885 cents per hundred-weight.

Q. Was that in each case added to the lcl rate?

A. It was.

Q. Does this figure include cartage under the lcl?

A. It does not.

Q. It does not?

A. No.

Q. So that taking Daytona as an example, the pounds sold to Daytona as increased by six per cent and multiplied by the lcl rate and then there was added a figure showing cartage per hundredweight; is that correct?

A. That's right.

Q. Now, opposite this total figure that appears at the end of the column "revised calculation, amount" and to the left are the letters "A.V.G." and a figure, both of which are encircled in pencil. Will you tell us what those letters and that figure mean?

A. Well, after performing the calculation illustrated for Daytona for all points of destination and adding up the
total freight and cartage expense, that amount divided
3180 by the net weight of the total shipments to Florida
and Georgia gave us an average cost which is indicated in the circle.

Q. And the letters "A.V.G." mean average?

A. An arithmetical average.

Q. And av rage for how many pounds?

A. Per hundredweight.

Q. Now, which figure was divided into the total appearing at the bottom of the column "revised calculation, amount"? The figure showing the net weight of the material shipped or the figure showing the gross weight? That is, the net figure as increased by six per cent?

A. The figure showing the net weight of the shipment was used as the divisor; sir.

Q. Now, the figure which shows the total of the freight and cartage as calculated on the lcl rate and which appears at the bottom of the column entitled "revised calculation, amount" also appears, does it not, on Respondent's Ex-

hibit 170-A for identification, opposite the words "plus ⅜ths" and under the second column entitled "total freight and cartage"; is that correct?

A. Yes, sir.

Q. And the figure on Respondent's Exhibit 170-A for identification opposite the words "plus ⅜ths," under the heading "average freight per hundredweight," are the same as the figures encircled preceded by the letters
3181 "AVG" which appear on the left of the total under the column "revised calculation, amount" on Respondent's Exhibit 170-B for identification; is that correct?

A. Yes, sir.

Q. Now, will you tell us how the figures on Respondent's Exhibit 170-A for identification, under the general heading "heavy and soft paste white lead" opposite the word "par" were arrived at?

A. They were arrived at by subtracting from the total sales shown on our sales accounting records the net weight of the shipments to the plus ⅜ths zone, the difference representing par shipments.

Q. Did you subtract the net weight or the gross weight of the shipments to the differential territory?

A. We subtracted the gross weight of the shipments to the plus ⅜ths zone from the total net weight—from the net weight of the total shipments.

Q. And the result of that was the figure appearing opposite the word "par" under the heading "total pounds sold"?

A. That's correct.

Q. Now, will you tell us how the figures appearing on Respondent's Exhibit 170-A for identification, opposite the word "par" and under the heading "total freight and cartage" were determined?

A. From the total freight and cartage expense of
3182 our white lead in oil department for the year 1941 expense records, we deducted the calculated amount of freight and cartage for the shipments to Georgia and Florida listed on Respondents' Exhibit 170-B. The difference applying to our par zone.

Q. Now, will you tell us how the figure on Respondent's Exhibit 170-A for identification, opposite the word "par" under the heading "average freight per hundredweight" was determined?

A. Well, having determined the amount of freight and

cartage applicable to the par zone; that figure was divided by the total pounds sold in the par zone, giving us an arithmetical average cost of freight and cartage in the par zone.

Q. And that is an average freight and cartage cost per hundredweight?

A. Per hundredweight, yes.

Q. Mr. Baum, I call your attention to Respondent's Exhibit 170-B for identification, the next to the last column headed "freight gross weight calculated on carload rates," and to the figure at the bottom of that column, and ask you what that figure represents (showing to witness)?

A. That figure—you refer to the amount?

Q. Yes, to the amount.

A. The amount at the bottom of that column represents the cost of delivering white lead in oil to Georgia and Florida in the year 1941 to the respective points of
3183 destination, each of which was calculated on a carload rate basis.

Q. And that is the total figure for freight and cartage for all of these shipments based upon carload rates; is that correct?

A. That's correct.

Q. To the left of that total figure and in a pencil circle are the letters "AVG" and a figure. Will you tell us what those letters and that figure represent?

A. That represents the average cost per hundredweight of material delivered to Florida and Georgia, calculated by dividing that figure, by dividing the amount by the net weight of materials shipped.

Q. In other words, that figure just to the left of the total amount figured on the carload rate, is equivalent to the average cost to the Atlantic Branch per hundredweight of these particular shipments to these particular towns in Florida and Georgia and in the particular amounts as figured on the carload basis, the carload rate basis?

A. Yes, sir. That is a calculation only figured on a carload basis. It is not taken from any record.

Q. And those carload rates were obtained, as you stated, from the traffic department of the general office?

A. We are still using the same rates referred to previously, carload rates.

3184 Q. Now, I show you the last column on this exhibit, Respondent's Exhibit 170-B for identification, and I call your attention to certain figures which appear

on the last two lines underneath that heading, and ask you what they represent?

A. Well, the next to the last line represents an amount arrived at by calculating the cost of shipments to Georgia only, based on one carload shipment to each point of destination listed for Georgia.

Q. At the minimum carload weight?

A. At the minimum carload weight and carload rates applying thereto.

Q. What is the last figure on that line, under that column? What does that represent?

A. The last figure on that line represents a cost calculated using the same method but covering both the states of Georgia and Florida. In other words, the figure referred to—the amount referred to a moment ago was simply a sub-total for the State of Georgia. In working up these figures we show separate totals for Georgia and Florida, and then a grand total.

Q. And this last figure is the total of the two sub-totals for Georgia and Florida?

A. That's correct.

Q. Now, to the left of that figure, which is the 3185 grand total, under the last column on Respondent's Exhibit 170-B for identification, are the letters "AVG" and a figure in a pencilled circle. Will you tell us what those letters and that figure mean?

A. That is an arithmetical average arrived at by dividing the total amount calculated on the basis just mentioned by the net—by the total net weight of shipments to Georgia and Florida.

Mr. DuBose: I ask that this document be marked Respondent's Exhibit 171.

Trial Examiner Norwood: It will be marked for identification as Respondent's Exhibit 171.

(Whereupon, the document referred to was marked Respondent's Exhibit 171 for identification.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

By Mr. DuBose:

Q. Mr. Baum, I show you Respondent's Exhibit 171 for identification, and ask you what that represents (showing to witness)?

A. Well, that represents a summary of the figures calculated on Exhibits 170-A and 170-B. It is put in the form of a letter.

3186 Q. That was pursuant to request?

A. That is pursuant to a request that we received for information.

Q. Now, is it correct to say that on Respondent's Exhibit 171 for identification, under the heading "1941 sales of heavy and soft paste white lead," the figures appearing are the totals of the figures appearing on Respondent's Exhibit 170-B—I will withdraw that.

Mr. Baum, you prepared this document which has been marked Respondent's Exhibit 171 for identification?

A. Yes, sir, I did.

Q. And the figures which there appear under the heading "1941 sales of heavy and soft paste white lead" are the figures which appear on Respondent's Exhibit 170-B for identification, as figured on the less than carload rate; is that correct?

A. If you add as presented on Exhibit 170-B and Respondent's Exhibit 170-A, that is correct. In other words, these two schedules together form the basis of that summary.

Q. Now, the total freight and cartage figures and the average freight per hundred pound figures which appear under this heading "1941 sales of heavy and soft paste white lead" are the result of the calculations made on Respondent's Exhibit 170-B for identification, on the less than carload basis; is that correct?

3187 A. Yes, except that you have got to bring this other sheet into consideration.

Q. To arrive at the par—

A. To arrive at the difference which was par. In other words, the Exhibit 170-A shows the total. Now, Exhibit 170-B shows Florida and Georgia. Now, in order to get the par we deducted the figures on Exhibit 170-B, Florida and Georgia, from the totals shown on Exhibit 170-A which gave me the calculation for par.

Q. This first calculation is based on the less than carload rate?

A. Yes. That appears definitely on Exhibit 170-B only. Yes, that is correct.

Q. Now, with regard to the last calculation on Respondent's Exhibit 171 for identification, under the head-

ing "a calculation was also made using the same quantities and destinations but based on carload shipments and rates and the result follows" were similarly based upon the figures which appear on Respondent's Exhibit 170-A and B for identification as figured on the carload rate?

A. That's correct.

Q. Now, the last sentence which is a separate paragraph on Respondent's Exhibit 171 for identification contains the average per hundredweight as figured on Respondent's Exhibit 170-B for identification, in con-
3188 nection with the last column on that page in the fashion that you have explained; is that correct?

A. That's correct.

Q. In other words, that particular calculation which appears in the last sentence and the last paragraph of Respondent's Exhibit 171 for identification is the result of figuring the freight which would have applied had all of these shipments to the particular towns involved in Florida and Georgia been made in carload lots in the minimum carload quantity; is that correct?

A. Not quite. I would say it would represent the average freight that would have applied had we made one carload shipment to each point of destination in Georgia and Florida, figured at the carload rates.

Q. That is what I meant to imply.

Mr. DuBose: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. DuBose.

Mr. DuBose: May we withdraw this witness temporarily, Mr. Examiner?

Trial Examiner Norwood: He may be withdrawn.

(Witness temporarily excused.)

Trial Examiner Norwood: Proceed.

3189 Mr. DuBose: I call Mr. Leonard Werne.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Leonard Werne, 76 Halsted Street, East Orange, New Jersey.

LEONARD WERNE was thereupon called as a witness on behalf of the company and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DuBose.

Q. Will you state your full name?
A. Leonard Werne.
Q. What is your address?
A. No. 76 Halsted Street, East Orange, New Jersey.
Q. Mr. Werne, by whom are you employed?
A. By the National Lead Company, general office.
Q. At 111 Broadway?
A. At 111 Broadway, New York.
Q. In what capacity?
A. At the present as assistant traffic manager.
Q. How long have you occupied that position?
A. Since February 1941.
Q. And prior to that time, what was your position with the National Lead Company?
A. I was employed on January 2, 1923 as rate clerk, which position I held and continued to hold in addition
3190 to duties as chief clerk, until April of 1926, at which time I was named assistant to the traffic manager at St. Louis, Missouri. On January 5, 1931, I was transferred to San Francisco, California, as assistant traffic manager, which position I held until coming to New York in 1941 as assistant traffic manager.
Q. Now, Mr. Werne, during the course of your entire employment, then, you have been concerned with rates and traffic rates as they apply to products shipped by the National Lead Company?
A. That's correct.
Q. And you have had occasion to check official tariffs, commodity rates, carload and less than carload rates from various points as they might apply to a particular product or products of the National Lead Company?
A. That is correct.
Q. You do not remember offhand all of the traffic rates which might be applicable to white lead in oil for the year 1941, do you?
A. You mean throughout the country?
Q. Throughout the country.

A. No, sir.

Q. Would you know without refreshing your recollection what the lcl or carload rate for white lead in oil might be from Brooklyn, or New York, to any particular
3191 town or city in Florida and Georgia?

A. No, sir.

Q. Have you any records with you which would refresh your recollection as to the rates applicable for shipments of white lead in oil in 1941 from Brooklyn or New York to various towns in Florida and Georgia?

A. The question is, do I have that available?

Q. Yes.

A. I do.

Q. Will you produce such records?

A. Yes, sir (handing papers to counsel).

Q. Will you tell us, Mr. Werne, and in each case give the official tariff or whatever the official rate classification might be, what the rate for a white lead in oil shipment from either Brooklyn or New York in 1941 would be to Daytona, Florida at the less than carload rate?

A. Can I ask to have that question re-read.

Trial Examiner Norwood: Read the question.

(The reporter read the question as follows:

"Q. Will you tell us, Mr. Werne, and in each case give the official tariff or whatever the official rate classification might be, what the rate for a white lead in oil shipment from either Brooklyn or New York in 1941 would be to Daytona, Florida, at the less than carload rate?")

3192 Trial Examiner Norwood: What is that document you are refreshing your memory from?

The Witness: These are in effect the freight rates with the complete tariff authority for each rate which I could not retain in my mind due to the fact that there are thousands of them.

Trial Examiner Norwood: Did you make that from the official rate books and so on?

The Witness: I did, sir. I made part of it and all of it was done under my supervision.

Trial Examiner Norwood: Does it specify which rate books it is taken from so that it can be verified?

The Witness: Yes, sir, it certainly does.

Trial Examiner Norwood: Proceed.

The Witness: The rate from New York to Daytona,

Florida, on shipments of white lead in oil of 100 pound lots was 89 cents for 100 pounds from the New York dock of the steamship line to store door delivery at destination.

By Mr. DuBose:

Q. Is that for the year 1941?

A. That is for the year 1941. Now, in qualifying the authority for that rate, I might say that it is known as a combination rate which was made over Jacksonville, Florida. It is a combination of two rate factors made over Jacksonville, Florida, and the tariff authority for the
3193 combined rate was Atlantic Seaboard Freight Tariff 45 Series and the St. John's River Line Tariff 11-A Series.

Trial Examiner Norwood: We will recess at this time until 2 o'clock.

(Whereupon, at 12:30 o'clock p. m., a luncheon recess was taken.)

3194 Afternoon Session.

2:00 p. m.

Trial Examiner Norwood: Come to order. Will you resume the stand, Mr. Werne.

LEONARD WERNE resumed the stand and testified further as follows:

Direct Examination (Continued).

Trial Examiner Norwood: Proceed.

Mr. DuBose: Your Honor, shall we excuse the witness until the matter of the motion made last week in Washington is taken up?

Trial Examiner Norwood: I don't think it makes any difference. There is nothing that he should not hear.

Mr. Wright: Your Honor, since Mr. Hinds is here at this time I would like to renew the motion I made earlier on page 2686 of the transcript and strike certain portions of the testimony of the witness Sprague for the same grounds as were covered fully in the memorandum brief that I filed in support of the motion for striking the testi-

mony of the witness Burrus, on the ground that it was improperly admitted and is incompetent, hearsay and opinion testimony based on facts and records which were not available for the purposes of cross-examination and which were not within the personal knowledge of the witness.

Trial Examiner Norwood: I have noted here that your previous motion was directed to page 2551 line 16, 18 and 19.

3195

Mr. Wright: That's correct, sir, and also beginning with the words "but facing" on line 5 of page 2710.

Trial Examiner Norwood: I have got that beginning with the words "but facing" through line 19 and 2721 line 31 through page 2725 through line 4. Page 2729 line 2 through 2730 through line 9.

Mr. Wright: That is correct, sir.

Trial Examiner Norwood: May I look at the transcript on that?

Mr. Wright: Yes, sir.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed, Mr. Hinds.

Mr. Hinds: Generally as to the charge that these statements by a chief executive of a business division are hearsay, it seems to me that the objection stretches the hearsay rule far beyond any tolerable limits even if this were a court of law where the rules of evidence are very strictly observed and are fortiori in this administrative tribunal where there are more practical standards for admitting testimony.

3196

To illustrate, the Commission without objection was permitted to ask and get the answers from a large number of businessmen as to who their competitors were. Had I objected that that is hearsay, I think I should have been left out of the hearing room and I should have deserved to be let out of the hearing room.

Yet there is even a sounder basis for saying that such testimony is hearsay, than to make that objection to these things that are the subject of this motion. The head of a business necessarily gives hearsay testimony by that strict definition when he states who his competitors are.

The only legal evidence by the strictest theory would be

the evidence of some person who was present at the customer's office and saw a man come in whom he could identify as a salesman for the customer. Usually, the chief executive would not have had that experience because salesmen's customers don't come in while their competitors are there. I mean competitors' salesmen don't come in while their competitors are there, so that at the least, it would be secondhand testimony, hearsay, through the salesman, but actually would be thirdhand because even the salesman wouldn't be able to give legal evidence by this strict theory of my adversary.

3197 Actually what this executive says when he answers a question, "Who are your competitors?" he is saying what his salesman said his customers told him. That is the only knowledge he could possibly have. He comes in there and he gives that testimony based partly upon what he has heard second or thirdhand at the least or what he has gotten from some record which itself would be incompetent as legal evidence.

Now I say that that stretches the hearsay rule, stretches it too far. I say that a chief executive can say—we certainly wouldn't object and didn't object—who his competitors are. He can also say which of his articles is most popular.

The head of a shipping line can say, "We lost two ships last year through submarines." Would my opponent jump up and say, that is hearsay. Were you there? Did you see those ships sunk? How do you know that they weren't captured, or how do you know they are not still sailing the high seas?"

Now I think you will find that what I have said applies to every one of these objections insofar as it is hearsay. This man came in here and was paid to know the facts of this business the same as a railroad man knows that he has a spur line out of Altoona although he has never been to Altoona. So much for hearsay.

3198 I don't think that the standard that my friend seeks to use against us would leave very much of his testimony in the record. Now as to the objection that you can't compare two magnitudes or two quantities unless you can give at least an approximation of each by itself, that I think is demonstrably unsound.

The issue here is not how much the added elements of cost—there are seven of them, by the way, in these oxides

as I recall them offhand. There is the added railroad freight or trucking in smaller lots. There is the warehousing where it is in smaller lots, the added cost of soliciting, that is sales, the fact that technical services are required by the small people which the big people don't require because they have their own technical experts.

Then there is the added clerical work, invoicing and so on, the existence of which I think courts take judicial notice of. There is the added expense of investigating doubtful fellows as to their credit even if they pay their bills, and the expense of getting after them and collecting from them.

Then there are credit losses. Now the question is not how much each of those is or how much they are in the aggregate related to a pound of a product but the question is, is that aggregate as much as or greater than ½¢ per pound?

3199 Now I say you do not have to be able to give even an approximation, much less an arithmetically demonstrated precision figure of each of two quantities in order to say that one is greater than the other. After a tornado, a pole is down sticking out of a well. The witness sees it and he is asked "Was the pole longer than the depth of the well?" and he unhesitatingly says, "yes."

Yet he didn't get near the place and he couldn't for the life of him tell you how long the pole was or how deep the well was, but he knows that the pole was longer than the depth of the well.

An experienced fisherman who has fished a certain lake for many years and he has gotten paid to take people around testifies that there are more fish at one end of the lake than there are at the other. He couldn't possibly tell you how many fish there are at either end.

A seaman in an admiralty case says that ship "A" was further from him at the time he observed the situation than ship "B" but he can't give you an estimate as to how far either one was from him. But he knows that "A" was further away from him than "B."

Mankind for centuries knew that the sun was larger and further away than the moon. They seem to be about the same size but yet it wasn't until the time of Galileo that they knew even the approximate size of either one of

3200 those heavenly orbs or how far away they were from the earth.

Now an experienced man comes in and says, "I can't

possibly give you the figure which represents the aggregate of all these added expenses. I can give you a rough guess on freight but the freight is about 25¢ per 100 more in the less than car load lots."

By the way, the evidence on that is here. The lawyers could dig it out if the clients could possibly afford to pay the lawyers for that work. The lawyers could dig it out but it would be a very elaborate piece of arithmetical analysis because we have all the freight rates and we could probably figure out for you what on the average the Glidden Company from its plant in Hammond which is the same freight rate I understand as from Chicago had to pay for less than car load lots as against car load lots.

Mr. Sprague and Mr. Burrus said that it was somewhere around 25 per cent which itself would be half of the entire aggregate. Now the evidence is there to be dug out. Our books do not distribute freight rates although that is an arithmetically ascertainable figure.

Our books do not distribute freight rates according to whether they are between car load lots and greater than car load lots. As a matter of fact, they don't even distribute them as between zones or as between different kinds of oxides. We can't get that from the books.

3201 It seems to be assumed here that we are ducking and coming in here with secondary evidence when we might get it from our books. It isn't in our books. The only way we could get that out, and I admit that it would be physically possible, would be to make an exceedingly expensive analysis, a survey.

You would have to take each separate invoice and relate it to whether it was less than car load or more than car load for a particular product. That is impracticable.

The Witness Sprague said that it was imprudent. Meaning that the advantage of it in this law suit wouldn't justify the expense. Now that happens to be one of the arithmetically ascertainable things.

I say it is impracticable even though I admit it is arithmetically ascertainable. Now warehousing: That is probably less arithmetically ascertainable than freight although that is conceivably the possible thing to do, but we don't keep our books that way.

Now when you get into these other things I say we are prepared to devote the entire assets of the Glidden Company to this study then we couldn't give it to you as an

arithmetical attitude. You still have to have a business-man's judgment.

The expense of following up credit investigation—how can we possibly relate that to dollars and cents except
3202 to say in our judgment that the expense is very much larger in the case of the little fellow than in the case of the big fellow? In fact, one of these witnesses, I forget which, said there was no expense of credit investigation or collection with respect to the big man. Now possibly credit losses, one of the seven, possibly that could be dug out by an elaborate analysis, but it can't be taken from the books.

The books don't show that. You would have to dig it out from the original records and make an elaborate study. Now when you come to such things as selling expense, a salesman—it takes just as much time for a salesman to call on a little fellow to get a 500 pound lot as it does to call on a big fellow and maybe the big man may give his order over the telephone for a car load.

We can't reduce that to dollars and cents and we couldn't possibly do it. Now it seems to me, and I think I am on sound ground that has been walked over before, when I say that the standards of evidence in this tribunal are practical standards.

I say that the standard that my friend invokes, the standard of evidence for justifying these quantity differentials—incidentally, this would apply to zone differentials—the standard that he invokes would make it impossible for any concern within the juri diction of the Federal Trade Com-
mission, and I suppose the same would apply to the
3203 courts if it is a rule, that same standard would allow differentials only to two groups of business people in this country. One, people whose volume of business in a certain commodity is big enough so they could afford as a practical business matter to go to the expense of either keeping their books on that basis or making elaborte surveys and hiring lawyers to come in and present it through witnesses or people whom the Federal Trade Commission didn't happen to get after, because everybody else, and that would include us, will be excluded from having any quantity differentials by this standard of evidence because our business people knowing all about this and having the advice of counsel as to what is involved in our friend's hoped for

standard of evidence on justifying differentials have decided that it simply is impracticable.

They cannot do it. It would cost more to meet my friend's standard than all the net profits of engaging in this particular business that would be lost by giving up differentials.

Now you heard one of our witnesses say that only about 10 per cent of our business is to the car load lot people. We would like to have them more but we can't get much more, and it wouldn't be safe for us to take much more, both of them said, if we could get it.

So the result of applying this standard against us,
3204 and it will be all the more so with regard to still smaller concerns, will be that we will have to give up either the car load business or the less than car load business. It happens that it would be the car load business, I suppose, although that is the cream of our business.

That is where the profit lies despite the differential as both witnesses said. We would have to give that up or go out of business because we can't give up the less profitable small business because that represents, I think Mr. Burrus said, 90 per cent or a very large per cent.

Now that is the practical situation here. Now another objection has been made or implied that the testimony doesn't go far enough to say that there are added—that it costs more to investigate credits of the little men, it costs more to ship freight in less than car loads and so on. That is objected to on the ground that it doesn't go far enough.

My friend says it has no probative force. I don't think this court has the right—assuming that it were the only objection in the case—I don't think this court is justified in assuming that there will be no further evidence. If that is the only objection, it doesn't go far enough.

How do we know that one of the other respondents perhaps won't come in and give some evidence that will
have some evidentiary application to the Glidden
3205 situation? The commodities are approximately the same. In fact, if they weren't approximately the same we couldn't be brought in here under the same complaint.

So that seems to me it can be disposed of by saying that we have no right to anticipate what further evidence will be in the record to supply that which may be lacking. I don't admit there is anything lacking. I think this goes entirely to the weight and not to the admissibility of the evidence.

I say that when an experienced businessman, even though

his experience may been have derived as everybody's experience is from what other people have told him, his subordinates, and even though it may be in part derived from records over the years that he has consulted, when he gives you a business fact such as, who my competitors are, I say that he is giving evidence. He is giving legally admissible evidence and the only question there is for the finder of the facts, the trier of the facts, to say what weight shall be given to it.

Now in detail the first one is at page 2551 line 7 to 19. Mr. Sprague was asked what his experience was in selling the smaller battery manufacturers as compared to the larger ones. He says, "The smaller battery manufacturer was saleable at higher prices but the cost of selling him was sufficiently high to end up in an offset."

3206 We can't give you any better evidence than that. It is impracticable. We can't have stop watches on everyone of our salesmen. We have no records. We have to depend on the business judgment for what it is worth of the man who can size up on the witness stand and say whether or not he was a competent man and knew what he was talking about.

Now on page 2710 lines 5 to 19: He was asked whether he had made studies. I assumed his answers would be no. "Have you made analysis of the varying operating costs so that you can allocate them as to sales, as to the various classes of customers in the battery business?"

I assumed he was going to say no and to my surprise he said: "But facing the problem in its broad aspects I recall one time that we made quite an analysis of the losses we had sustained in our sales to the storage battery industry. This was some years ago but I recall it because I used it as an argument on one of my visits to our headquarters office to see if I could persuade the company to adopt a more liberal credit attitude," and so forth. I won't read all of it.

I maintain that that is relevant as showing in part the basis of his business experience which enables him to answer a broad general question with respect to his business which I still maintain is analogous to the ques-

3207 tion who are your competitors; who is your principal competitor?

Trial Examiner Norwood: You are referring now to page 2710 beginning with line 5?

Mr. Hinds: Yes, sir. Now page 2721 line 21 to page 2725 line 4, there are about four pages there that he wants to have stricken out. Some of it is colloquy but it starts with this question: "With respect to the expensive collections and investigations, from your experience was there any difference between such expense in connection with sales to small battery manufacturers as contrasted with the large ones?"

"A. Oh, yes, there was no expense of that sort in connection with the large ones."

So you have zero on one side.

Then I said: "What about the small ones?"

There were a lot of objections and your Honor finally allowed him to say, and he wants it stricken out: "Those expenses with regard to the small manufacturers were high."

That is only part of the story. He is later going to say that taking all of these seven things together they amounted to more than one-half per cent per pound in his judgment, in his experience. I say you have a better analogy—a perfect analogy to my case that the man said that the
3208 pole that he saw sticking out of the well was longer although for the life of him he couldn't tell you how long either one was.

Then he goes on: "Now as to the expense of any of the warehousing, was there any difference between expense there and sales to the large manufacturers and sales to the small manufacturers?"

And he said: "Yes, there was a difference." He said there was a difference. He couldn't tell how much the difference is, but when you ship less that a car load in order to be able to give service in a distant city you have to put the stuff in a warehouse. You have the warehousing charge and the in and out charge.

We can't tell you that in detail. It is impossible. Even if it were possible, the expense would be prohibitive. We would have to suffer a cease and desist order preventing us from having any of that business or having a differential if we had to meet such a standard of proof, and it would be even more so if the principle were established applying to still smaller units of business.

The Glidden Company is a sizeable company but this particular lead oxide business is not a sizeable business at all. It is a very small business. The whole net profits would

be wiped out in legal and accountancy and other expenses and travelling if we had to meet this standard of proof.

3209 Then he goes on. The same thing is true with a cash discount. He tells you how much the cash discount is, 1 per cent, which isn't available to the larger car load buyers. That requires a pencil and paper and counsel can figure that out in his brief.

We are not threatening you with that and I don't think we intend to do it, but we are going to rely on principles that I am invoking here. It is the question of the weight of the testimony of a businessman.

As your Honor pointed out, this man's testimony is peculiarly evidentiary because he has to risk his business life on it. A trapeze performer whose life depends on whether that rope is strong enough, and he tells you that it is strong enough, that is better than a college professor telling you how strong the rope is. His very life depends on his judgment and the business life of these witnesses depends on the judgment that they have to reach in these matters.

Then we go to clerical items.

Trial Examiner Norwood: What page is that?

Mr. Hinds: The bottom of page 2724, invoices, clerical items.

Trial Examiner Norwood: That is not in the motion, page 2724.

Mr. Hinds: Yes, it is sir. It goes all the way from

3210 2721 to 2725.

Trial Examiner Norwood: Yes, I beg your pardon.

Mr. Hinds: I suppose that if we should give up manufacturing lead oxides and go into the cost accountancy business, we might be able to give you a figure on postage and typewriters, salaries, and so on, and typing ten invoices instead of one invoice, ten letters instead of one. But it would take all the net profits of the business to attempt any such thing.

Page 2729. That is the $64 question which sums up everything before, asking him in his judgment whether he made any study into what is the effect.

He says, "We gave considerable attention to the cost of doing business as among customers of various sizes and customers of various kinds and customers at various locations out of which we realized as I stated in my earlier

testimony that we had to do certain things with respect to the type of trade we sold in order to make a profit.

"But there was no accounting study prepared to reduce it to a specific figure."

Then I said, I asked: "In your judgment would it or would it not have been practicable to classify your accounts so as to allocate the time spent by various executives, salesmen and others to these different classes of customers?"

"A. It would not have been practicable nor would
3211 it have been prudent. We were obliged to operate with a minimum of affixed expense of that sort."

So in conclusion, I want to point out that the standard which my friend seeks to invoke of attempting to justify these quantity differentials and other differentials is an impractical standard which cannot in business life be met except possibly by concerns who have such a very large volume of business that the expense would only be a fraction of their net profits.

But even as to them, many of these expenses couldn't, if they had unlimited funds and were willing to go into bankruptcy, be reduced to any arithmetical standard.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hinds: I would like to have your Honor give such weight as my argument may have in its application to the portions of the Burrus testimony which has already been stricken out.

Trial Examiner Norwood: I will consent to that.

Mr. Wright: I would like to say in answer to that, that of course the arguments that counsel made were equally applicable to the testimony of the witness Burrus be-
cause the testimony of both of those gentlemen was in
3212 exactly the same category and was apparently based on exactly the same sort of information. We are dealing now with a statutory provision under Section 2-B of the Clayton Act which is a special statutory provision.

Your Honor can take judicial notice of the fact that in the numerous other cases which have been decided by the Commission where the question of cost justification of differences has come up that the rulings have without exception been the requiring of a detailed justification on the basis of some records rather than opinion or expert testi-

mony by one of the executives which precluded any cross examination by Commission's counsel of the factors which went into his testimony.

Now with regard to the special burden that is raised under Section 2-C there, Congress apparently drew that portion of the statute with exactly in mind the situation that we have here with regard to the burden of proof and the burden of going forward with a cost justification after discriminations have been shown in the record.

As I stated in memorandum brief, Congressman Gilchrist in the Congressional Record, Page 8241, May 28, 1926, stated regarding this section: "Along this same line something has been said in argument about the burden of proof and it has been asserted that the bill is not constitutional because those who have specific and certain
3213 knowledge of their own good faith are permitted to prove it.

"We should distinguish between the duty of going forward with the evidence and the burden of proof. It is often wise to place the burden of producing evidence on the party best able to sustain it. It is very often held that where the party who does not have the original burden of proof but who possesses positive and complete knowledge concerning the existence of facts which his opponent has called a negative or where for any reason the evidence to prove a fact chiefly, if not entirely within the control of the party who does not have the general or original burden of proof, then the burden of going forward with and producing this evidence rests upon him who does have the facts primarily and chiefly within his possession."

And he went on to state that that section of the bill provides that after it has been shown that discrimination in price has really occurred, then the duty of going forward with the evidence to show justification and good faith rests upon the party who has almost exclusive possession of such evidence of good faith and who has such easy means of proving it.

Now Mr. Hinds has indicated that a number of these factors about which we are talking about can be ascertained. As to some of them he expressed doubt. But certainly the record doesn't show sufficient evidence to
3214 prove that doubt as to whether those things can be ascertained and they have been ascertained many

times in similar cases before the Commission involving exactly this proposition.

My adversary also states and admits that this is proof in his opinion that the differences in cost more than justify the differentials in price. In other words, he considers it to be competent evidence for that purpose.

Now a number of statements were made there which I don't believe were supported by the record, statements of fact. It was stated that it takes as much time by counsel in his argument for a salesman to get a 500 pound order as a car load order. Well now, that is something that can be ascertained by competent testimony.

It has not been shown in this record to be the fact. He contends that we cannot go back of and that we rely upon the opinion testimony of a competent executive.

Mr. Hinds: Oh, no. You can rebut it but you can't exclude it.

Mr. Wright: Who obviously knew what he was talking about. Well, I submit to your Honor that when on cross-examination it appeared that the witness had no figures or studies upon which to base his testimony, we couldn't tell whether he knew what he was talking about or not. I don't believe that Mr. Hinds is seriously going to urge the various analogies that he raised there of the testi-
3215 mony by the various witnesses as to who their com-petitors were as having any bearing on this testimony.

Certainly it was not established as to that testimony that these gentlemen weren't basing that upon evidentiary facts that were within their own knowledge and certainly the analogy of the pole sticking out of the well has little to do with this question.

Now as to the specific parts of the record to which this motion relates, it is perfectly plain that the testimony goes beyond the mere opinion testimony by an executive that their costs were higher in dealing with certain classes of customers. It goes right to the heart of the matter, and as to the effect that they actually suffered a loss in dealing with these certain classes of customers, that the differentials and discriminations, the higher prices to the smaller purchasers did not recompense them for the higher expenses and we are asked to accept that in spite of the statement that 90 per cent of the business is with less than car load purchasers.

Now the original question and answer which appears on page 2551 and which was the grandfather, as it were, of all this other testimony which was brought out on cross appearing on lines 17, 18 and 19 of page 2551, the smaller battery manufacturer was saleable at higher prices but the cost of selling him was sufficient to end up in an offset.

3216 Mr. Hinds: That means an offset of the difference in price. It doesn't mean any loss. I don't think we claim that we sell at a loss as a whole.

Mr. Wright: There is intended by that opinion testimony to justify the discrimination which has been shown. It is the adding of the sum of all these factors and stating that the difference in price didn't justify the higher costs or did justify the higher costs.

I will withdraw that.

Trial Examiner Norwood: Is there anything in the cross examination? In making those other rulings, the cross examination was controlling. Is there anything in the cross examination with respect to these statements?

Mr. Wright: Yes, sir.

Trial Examiner Norwood: Begin there with page 2551, lines 17, 18 and 19. He is stating there that they were an exact offset.

Mr. Wright: He didn't say an exact offset, but he said it was an offset. Now from the ordinary meaning of that word you must conclude that that meant that they received less net profit in selling to the smaller purchasers than they did from the large purchasers.

Mr. Hinds: That was so testified to expressly, I believe.

Trial Examiner Norwood: What have you in the

3217 cross examination that would throw light on that?

Mr. Wright: The only basis for that answer could have been some examination of the cost factors and some study of those various factors there from which he could reach such a conclusion. That would be a conclusion of fact rather than an opinion that was drawn out of the air.

On page 2709 of the record, on cross examination, the witness was asked. "Have you made any analysis of the various operating costs so that you can allocate them as to the sales to the various classes of customers in the battery business?"

Trial Examiner Norwood: 2709?

Mr. Wright: Yes. The answer that appears on page 2710 beginning at line 3 and running down to line 19 indi-

cates vaguely that they had gone into that in some fashion or another, but it wasn't brought out whether that was a written report or what kind of a study that was.

But when going on to line 22 of page 2710, "You do not have any study then from which you could state with any authority on the basis—"

Mr. Hinds: (Interposing.) By the way, that word should be "accuracy." The stenographer got it as "authority." You will concede that was "accuracy," won't you, Mr. Wright? I think you said accuracy and not authority.

Trial Examiner Norwood: The record may be cor-
3218 rected later.

Mr. Hinds: I think that should be accuracy and not authority.

Mr. Wright: The question then related to whether he had any statistics or studies of costs from which he could state with either accuracy or authority that he suffered a loss of sales to small battery manufacturers.

"A. I can state with authority of the observation and belief of a manager of the business who is watching the expenses and the costs which he sustains in doing business, but I couldn't show it from any accounting study in cents per pound."

In other words, it is plain in the record. Coming back now to pages 2729 and 2730, the witness stated at the beginning of line 23 of page 2729 the fact that they gave considerable attention to the cost of doing business among various customers but he wound his answer up by stating that this was something that they had observed in our business by a common observation.

It was there for all to see. But there was no accounting study prepared to reduce it to a specific figure. So, as appears there, he had nothing but an opinion and judgment upon which to base his answers, and the net effect of his testimony when you get down to the last questions that were asked him there is that it is an opinion and hear-
3219 say statement upon which he couldn't be cross examined that these costs were so high that they more than offset the price differences.

Trial Examiner Norwood: In the cross examination on the other questions it was definitely shown that the statements of Witness Burrus, the cross examination showed there that his statements were based on hearsay reports and counsel on the other side was deprived of any inquiry

into these bases and what they were and their reliability and so forth.

So far as I have gone here, I think that these statements here are on a different basis because he has not stated that they were based on reports made to him. He stated that they are based on his own opinion, on his own experience in his business. And the fact that they are not accurate goes to its weight.

Now the Commission is not justified in taking the position that this burden is to be sustained in any particular way. They have the burden of showing that the differences in the costs are no more than the differences in the price.

Mr. Wright: The Commission has that, sir.

Trial Examiner Norwood: No, not the Commission but the Respondents. I said "they" meaning the Respondents. But the Commission cannot say that you must put this in by tabulations made by an accountant or some other witness.

3220 The Commission cannot say that that has to be of a certain weight. It has to be of a sufficient weight to rebut the prima facie case. But it doesn't preclude the Respondent in putting in evidence that is vague even provided that it has any reasonable degree of substance in it.

We can't say that you have to do this through tabulations and through expert accountants. The difference between exact figures and figures which the man is willing to swear to as based on his experience may be a difference of weight. But I haven't had the record to use and I will reserve this ruling on this until tomorrow morning to read the record.

Mr. Wright: I would like to make one further observation, your Honor, in view of what you have stated here. On the question of whether this evidence is competent as proof of what is offered now, it is admittedly opinion testimony and it is admittedly broad and general statements.

Mr. Hinds: We don't admit that. In fact, I was going to interrupt and say that we do not regard it as opinion testimony but as judgment and experience and facts and not opinion.

Trial Examiner Norwood: Let him finish.

Mr. Wright: It is obviously opinion testimony by this witness. It is a broad and general statement by which

3221 we can't go into on cross examination. We can't get the details because it is just something he knows from

his experience. He can't detail the things in his experience that lead him to that conclusion.

As your Honor stated in your paper in the George Washington Law Review that type of statement is not proper evidence to prove matters which can be the subject of exact proof, not necessarily by an accounting survey but by the ordinary means of proving such matters relating to costs or profits or prices or sales and the like.

Mr. Hinds: Let me say just one more thing.

Trial Examiner Norwood: Very well.

Mr. Hinds: If it be opinion, the witness has shown the expertness which entitles him to give opinion evidence. We do not regard it, however, as opinion evidence even though the witness was qualified to give an opinion. We regard it as fact testimony, facts testified to by a man who has had experience and who states his judgment.

I would like to give one further analogy. A surgeon is testifying and he is qualified to give an opinion if such be needed but he doesn't give an opinion. He said that the tumor on the man's left lung was larger than the tumor on his right lung. There was no means, practical means, of finding out how large either of them was.

He couldn't give you even an approximation in 3222 ounces of either one of the tumors but not as a matter of opinion but as a matter of fact in the judgment of a skilled observer he says that one was larger than the other.

I maintain that that cannot be questioned on the ground that it is hearsay or opinion or doesn't go far enough, it goes to the weight.

Trial Examiner Norwood: I know, but even opinion evidence must be based upon facts that are on some evidence contained in the record, you see. And these statements of this witness were not given as being based on any of that.

Mr. Hinds: You mean the witness Sprague or the witness Burrus?

Trial Examiner Norwood: It is the witness Burrus, isn't it?

Mr. Hinds: I have been arguing about Sprague. You have already stricken out some of the Burrus testimony.

Trial Examiner Norwood: The witness Sprague.

Mr. Wood: If your Honor please, I would like to make a very short statement just to preserve my position on the record and I shall not be long.

Trial Examiner Norwood: Proceed.

Mr. Wood: I disagree entirely with Mr. Wright in respect to saying that this question arises in regard to Section 2-B of the Clayton Act. I think it arises in regard to Section 2-A. The Seventh Circuit Court of Appeals
3223 in the Morton Salt case brought out the difference between a differential and a discrimination which Attorney General Tom Clark had previously suggested in a publication and which was covered in our brief on our motion to dismiss.

The Seventh Circuit Court of Appeals held that a differential was not necessarily a discrimination, that there was a qualitative difference between the two.

Trial Examiner Norwood: That decision just simply placed the burden back on the complainant. Under that decision there would not be any burden. That is, according to that decision the burden would not be on the respondent any more.

Mr. Welch: The burden would rise in a different stage of the proceeding.

Mr. Wood: At any rate, here is my only point and I will cut it rather short. That is, that evidence should not now be excluded on the presumption that that decision will be reversed.

Mr. Hinds: Whatever the burden may be, we have undertaken the burden and whether we had to undertake it or not, we did undertake it. My argument is that we sustained it to such an extent as the triers of the fact will eventually give weight to it that it cannot be excluded as inadmissible on any known ground.

Mr. Wood: I didn't make myself fully clear. I
3224 have one more point and that is that I conceive testimony of the type given by Mr. Sprague and which I intend to attempt to introduce to be directed to the state of mind of the corporate executives as to whether or not these differentials publicly announced, available to all, are in fact and intended as discriminations in the sense of the statute.

Mr. Hinds: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: With reference to the Morton Salt case I agree that that was under Section 2-A and that related to when the Commission has sustained the burden under 2-A of proving discrimination. I am assuming now that

this testimony if offered to rebut the presumption as provided under Section 2-B of a discrimination under 2-A, so that it is not controlled by the Morton case.

Now it may very well be that counsel may contend that we haven't proved any discriminations under the rule in the Morton Salt case. Well if that is the case, of course this has nothing to do with it.

Mr. Hinds: I think I am not at odds with my opponent on that feature. As I say, whether we had the burden or not, we undertook to sustain it. I think we have done it to such a degree as the testimony has weight.

3225 Trial Examiner Norwood: I want to thank counsel for their assistance in this matter and after I read the record, I will give my decision tomorrow.

We will now take a short recess.

(A short recess was taken.)

3226 Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Werne, you were in the hearing room this morning during the testimony given by Mr. Baum, the previous witness, were you not?

A. Yes, sir.

Q. And you have seen his worksheet, marked Respondent's Exhibit 170-B for identification, have you not?

A. I have.

Q. And you heard him testify that to the net weight of the material, that is, the white lead in oil sold, there was added six per cent to approximate shipping weight, did you not?

A. That's correct.

Q. Are you, in your position with the National Lead Company familiar with shipping weights as compared with net weights of white lead in oil shipments?

A. I am.

Q. And were you familiar with such weights for shipments during the year 1941?

A. I was.

Q. Will you state what factors must be taken into consideration at arriving at an estimate of shipping weight as compared with net weight of white lead in oil?

A. Of course, the main factor is your tare weight

3227 for the package.

Q When you say "tare weight," what do you mean?

A. I mean the actual weight of the empty container.

Q. Now what is the average weight of the container as compared with the net weight of the white lead in oil itself?

A. Well, referring to Mr. Baum's testimony this morning, with reference to using a six per cent increase in the net weight in order to sustain a gross weight of 106 pounds, that, of course, referred only to a one 100 pound white lead in oil package. Now, that weight of six pounds tare for the container is arrived at through an agreement which is reached between the various weighing and inspection bureaus of the United States, which includes the Western Weighing and Inspection Bureau, the Industrial Weighing and Inspection Bureau and the Southern Weighing and Inspection Bureau.

Q. Are you testifying now as of your own knowledge there?

A. As of my absolute knowledge, yes. The packages in 1941 were manufactured at Granite City, Illinois. Approximately every six months test weights were taken of these packages by the three bureaus simultaneously and they arrived at the average weight for each empty container or group of empty containers. Now, as I recall, for 100 pound container, the tare weight arrived at was 6 pounds for the package and the cover. However, that varies a little as
3228 you go into a group of containers. The actual weight of one 100 pound empty white lead container may be 5.76. It may be 5.74. So that when you took a group, we would say, of 4 empty 100 pound white lead containers at an average of 5.75, your gross weight of those 4 containers would only reflect—I hope I am correct on this—23 pounds, instead of 24 pounds, when you take the per container average of 6 pounds which they arrived at for one container.

Q. Now, you spoke of certain tests being made. For what purpose were those tests made?

A. The tests were made for the purpose of obtaining the average weight to be applied for the empty steel containers or packages.

Q. Was that for the purposes of figuring freight?

A. That is correct.

Q. Now, when a shipment of white lead in oil is made, does the shipper actually weigh the material?

A. I would hesitate to answer that question, but I might, if I may, say this: When the tests of these containers are made by the respective bureaus and the weights per container or containers are agreed upon, a chart is set up from one which shows the gross weight which includes the hundred pounds of white lead in oil plus the gross weight, plus the tare weight ascertained for that package for one container, for two containers, for three containers
3229 and all the way down to a hundred containers. So that all that is necessary for a shipping clerk in any of our branches to do, is to look at the chart to determine what the gross weight for a set number of packages is.

Q. Now, you say, then, that 6 per cent represents the agreed percentage increase of net weight to obtain shipping weight for one, 100 pound package?

A. That's right.

Q. For groups of more than one 100 pound package does the percentage go up or down?

A. Generally speaking, they go down, because your average weight per package is not exactly 6 pounds.

Q. So that do you know what a hundred 100 pound bags or packages of white lead in oil would carry as shipping weight? What percentage increase of shipping weight?

A. I don't know without reviewing the file.

Q. It would be less than 6 per cent?

A. It would be less than 6 per cent, yes, may be only 10 pound, but it would be less.

Q. Now, going back to the line of testimony which we started prior to the noon recess, will you tell us what the less than carload rate for white lead in oil was in 1941 from either Brooklyn or New York, and specify the point of origin to Gainesville, Florida?

A. One dollar for 100 pounds, which applied from
3230 the dock of the steamship line in New York to store door delivery at destination.

Mr. Wright: Your Honor, I object to the witness reading into the record statements off a paper which is not in evidence. I move that that answer be stricken.

Mr. DuBose: Well, that, your Honor, will recall that prior to the noon recess, questions were asked this witness as to whether or not he could give independently these rates and he said no, he would have to refresh himself from this record which not only contains the actual rate, but gives the official source of each rate.

Mr. Wright: That is the point of my objection, that he is reading off a paper the rates and the sources and the routes. The paper is not in evidence.

Mr. DuBose: I will be perfectly willing to offer the sheet in evidence, except that without his explanation I think it means nothing and I think it is simpler to have it read into the record.

Trial Examiner Norwood: If the witness can use the paper to look at and then testify from his own recollection which has been refreshed, he can put the paper away and give us those figures.

Mr. DuBose: Perhaps that would take longer than if he just identified them.

Trial Examiner Norwood: If he made those and
3231 knows they are true and will give their sources, and it does not sufficiently refresh his recollection, it makes the paper itself admissible, isn't that right?

Mr. Wright: May I have that read, please?

Trial Examiner Norwood: Read my statement.

(The reporter read the statement as follows:

Trial Examiner Norwood: If he made those and knows they are true and will give their sources, and it does not sufficiently refresh his recollection, it makes the paper itself admissible, isn't that right?'')

Mr. Wright: That is correct.

Trial Examiner Norwood: Provided that it is relevant and properly substantiated.

Mr. DuBose: I believe there is an objection pending.

Mr. Wright: Yes, sir. The objection to that answer was a motion to strike really that answer, on the ground that he was reading from a long tabulation.

Trial Examiner Norwood: Can you answer that, then, from your own recollection, after being refreshed?

The Witness: You mean, your Honor, after looking at that form?

Trial Examiner Norwood: Could you repeat that figure without looking at the paper?

The Witness: That particular figure, yes, sir.

3232 Trial Examiner Norwood: What is it?

The Witness: One dollar.

Mr. DuBose: Can we go off the record?

Trial Examiner Norwood: He has a right to testify to that if he can do it of his own recollection, so I will deny the motion. Go ahead.

Mr. DuBose: Can we go off the record here?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Your Honor, I should like to ask that these four sheets be marked Respondent's Exhibit 172-A to D inclusive for identification.

Trial Examiner Norwood: They will be so marked Respondent's Exhibit 172-A to D inclusive for identification.

(Whereupon, the documents referred to were marked Respondent's Exhibits 172-A, 172-B, 172-C, and 172-D, for identification.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr Werne, I show you Respondent's Exhibit 172-A to D inclusive, for identification, and I ask you whether these were prepared by you or under your supervision?

A. They were prepared partially by me, but all under my supervision.

3233 Q. What do they purport to reflect?

A. The less than carload rates, also quantity rates and carload rates and the minimum weights together with other information necessary in order to give full explanation of the rate.

Q. Do they also show in each case the tariff authority for the particular rate cited?

A. They do.

Q. And have you checked the towns and the rates listed on Respondent's Exhibit 172-A to D inclusive for identification with the towns and the applicable lcl and carload rates listed on Respondent's Exhibit 170-B for identification?

A. I have.

Q. And are they the same?

A. They are not entirely the same.

Q. Will you point out to us what the differences are particularly?

A. Particularly there are shown on Respondent's Exhibit 172-A to D inclusive, certain quantity rates for lcl quantities which do not appear on Respondent's Exhibit 170-B.

Q. Now, the rates listed on Respondent's Exhibit 170-B for identification are what, lcl rates?

A. They are the lcl rates for a 100 pound shipment.

Q. For a 100 pound shipment?

A. That's right.

3234 Q. And in some cases, if I understand you correctly, they are for lcl shipments within the lcl shipment rates? There are also some quantity rates as distinguished from carload rates?

A. That's correct.

Q. Are all of those quantity rates, indicated on this Exhibit, Respondent's Exhibit 172-A to D inclusive for identification?

A. They are.

Q. Do you know whether or not the lcl rates listed as applicable to the various towns on Respondent's Exhibit 170-B for identification are the correct lcl rates for 100 pound shipments to those particular towns for 1941? Will you check them again and when you come to any difference, will you note it for the record?

A. Is it your desire that I point out as I come across any discrepancy in the two at this time?

Q. Yes.

A. Then I refer you to the lcl rate quoted on Respondent's Exhibit 170-B to Miami, Florida. The rate shown on such exhibit being 68 cents. That rate should be 69½ cents, the difference being that there is a wharfage rate of 1½ cents at Miami, which has not been included in the rate shown on Respondent's Exhibit 170-B.

Q. That extra cent and a half, then, is the wharfage?

3235 A. That's correct.

Mr. Wright: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. DuBose:

Q. Is that rate for lcl to Miami the only discrepancy you find between Respondent's Exhibit 170-B for identification and Respondent's Exhibit 172-A to D inclusive for identification, as far as the less than carload rates are concerned?

A. That is correct.

Q. Now, will you check the carload rates to the partic-

ular towns as listed on Respondent's Exhibit 170-B for identification with those listed on Respondent's Exhibit 172-A to D inclusive for identification and note on the record any discrepancies between the two exhibits?

A. The carload freight rates shown on Respondent's Exhibit 170-B, are identical with those shown on Respondent's Exhibit 172-A to D inclusive.

Q. That is the carload rates?

A. Yes, sir.

Q. Now I believe you stated, Mr. Werne, that Respondent's Exhibit 172-A to D inclusive for identification was prepared partly by you, but all under your supervision.

3236 A. That's correct.

Q. Can you state whether or not the rates there reflected are based upon actual tariff authorities in effect in 1941 as applied to white lead in oil?

A. They are.

Mr. DuBose: I offer in evidence at this time Respondent's Exhibit 172-A to D inclusive for identification.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I have no objection to the receipt of these papers in evidence. Of course, I don't mean by that to concede any right I might have that the rates might have been different with regard to any other testimony.

Mr. DuBose: Certainly.

Trial Examiner Norwood: It will be received in evidence as Respondent's Exhibit 172-A to D inclusive.

(Whereupon, RESPONDENT'S EXHIBIT 172-A, 172-B, 172-C, 172-D, heretofore marked for identification, was received in evidence.)

Mr. DuBose: I have no further questions of this witness.

Trial Examiner Norwood: Do you have any questions, Mr. Wright?

Mr. Wright: Your Honor, I am in no position to cross examine this witness. He has testified exclusively about papers which I have not yet seen and have had no

3237 copies furnished me. His testimony was unintelligible to me since I couldn't follow the exhibits about which he was testifying.

Mr. DuBose: We will be glad to make Mr. Werne available for cross examination at a future date to be determined by agreement between counsel.

Trial Examiner Norwood: With the exception of a few questions there which you asked which were based on his own knowledge, all this has gone to the identification of these papers, and the papers are here. If you are not going to examine him any further on the papers, there is no reason for further cross examination except on the identification. On the basic data, and so on, that is. But if counsel agree that he may be recalled, I will agree that he may have a deferred cross examination with this witness if you want to.

Mr. Wright: I don't see how I am in a position to proceed right at this moment with cross examining him, because all of his testimony has been with regard to these tabulations which, as I say, I have not seen yet.

Trial Examiner Norwood: We can proceed and have this witness come back tomorrow and counsel have these papers to study from now until then.

Mr. Wright: I wouldn't have a copy of the transcript. It was meaningless to me when he testified about the thing. I will be glad to do my best to cross examine him tomorrow.

Trial Examiner Norwood: He can go over by 3238 agreement of counsel.

Mr. DuBose: Will the witness be excused until 10 o'clock tomorrow morning?

Trial Examiner Norwood: Do you want to examine him tomorrow or do you want to put it off?

Mr. Wright: It may be possible for me to examine him tomorrow after I have had some opportunity of looking at this transcript today, because without comparing the exhibit and the transcript, I can't make much of his testimony.

Trial Examiner Norwood: Will you get a copy of the transcript tonight?

Mr. Wright: I will request a copy of the reporter.

Trial Examiner Norwood: You are temporarily excused until tomorrow morning at 10 o'clock, Mr. Werne.

(Witness temporarily excused.)

Trial Examiner Norwood: Can we finish with Mr. Baum now?

Mr. Du Bose: Yes, your Honor.

Trial Examiner Norwood: Mr. Baum, will you resume the stand please?

EDWARD L. BAUM, having been previously sworn, resumed the stand and testified further as follows:

Mr. DuBose: Your Honor, at this time we would like to offer in evidence these documents which have been
3239 identified by Mr. Baum, namely, Respondent's Exhibit 170-A and B for identification, and Respondent's Exhibit 171. May we state for the record that we would be perfectly willing to agree that counsel for the Commission have custody of these documents overnight to study them for the purpose of possible cross examination of this witness tomorrow, if he wishes to do so.

Trial Examiner Norwood: I will reserve the ruling until tomorrow morning so that counsel may have time to study those and to make his objections, if any.

Mr. DuBose: That will be perfectly suitable to us.

Mr. Wright: I will make every effort to prepare myself on these tomorrow morning and I will do my best in that regard. I am not prepared to make any voir dire examination on the identification nor to make any objections to the documents at this time.

Mr. DuBose: I take it, then, that the witness is excused until 10 o'clock tomorrow morning?

Trial Examiner Norwood: Yes. You are excused, Mr. Baum.

(Witness temporarily excused.)

Mr. DuBose: That is all we have today, your Honor. We have in addition to these witnesses being
3240 recalled, some further testimony to offer tomorrow and at this time I would like to suggest a recess until 10 o'clock a.m. tomorrow morning.

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning, June 19, 1947.

(Whereupon, at 4 o'clock, p.m., the hearing was adjourned until 10 o'clock, a.m. June 19, 1947.)

3241 Trial Room,
Bar Association Building,
36 West 44th Street,
New York, N. Y.,
June 19, 1947.

Met, pursuant to adjournment, at 10:00 a. m., EDST.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and

Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and

E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington, D. C.), appearing for Sherwin Williams Company.

3242 Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

3243 PROCEEDINGS.

Trial Examiner Norwood: Come to order. Pursuant to adjournment taken on June 18, 1947, the hearing in Docket No. 5253 is now reconvened in the Trial Room of the Bar Association Building, 36 West 44th Street, New York, N. Y., at 10:00 o'clock a. m., daylight saving time, June 19, 1947.

Let the record show the following appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and Henry E. Gardiner, Esq., appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and E. Z. Du Bose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for Sherwin Williams Company.

Roger Hinds, Esq., appearing for The Glidden Company.

Proceed.

Mr. DuBose: Mr. Werne, will you resume the stand, please.

LEONARD WERNE resumed the stand and, having
3244 previously been sworn, testified further as follows:

Further Direct Examination.

Mr. DuBose: Your Honor, I have a few more questions on direct examination.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Werne, I show you documents which were identified yesterday as Respondents' Exhibit 172-A to D inclusive, and I ask you whether you wish to make any corrections and, if so, what corrections on these documents (showing to witness)?

A. On Exhibit 172-C opposite the designation West Palm Beach, Florida, under tariff authority, the number 11 is shown which indicates and refers to the tariff reference shown on page 1 of Exhibit 172-A. This tariff reference No. 11 should be changed to No. 12.

Q. That is, the tariff reference on Respondents' Exhibit 172-C opposite the town West Palm Beach, Florida, under the heading "tariff authority" should read No. 12 instead of No. 11; is that correct?

A. That is correct.

Q. Continue, please.

A. Then referring to Exhibit 172-A at the lower left-hand corner is shown No. 11 with reference Clyde Mallory

A-289 series. The prefix to this tariff authority should read 12 instead of 11.

3245 Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: I have no further questions.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Werne, wouldn't you say that these freight rates that you figured in that exhibit and which were carried over into Respondents' Exhibit 170-A and B for identification to those Florida and Georgia points were complicated rates to figure?

A. They were.

Q. And—

Mr. DuBose: (Interposing.) Excuse me, isn't that in evidence too, Respondents' Exhibit 170-A and B?

Mr. Wright: It was my understanding that it is not.

By Mr. Wright:

Q. It is true generally that freight rates are complicated things, particularly when there is a joint route or a joint rate so that capable traffic experts can come out differently on them?

A. All freight rates are complicated.

3246 Q. So that in the last analysis very often the only way you can determine what a rate is, is by litigation over the shipping charges with the carrier?

A. Well, all freight rates must be published. Of course there is the question of trying to determine the lowest freight rate in effect. We believe in our own traffic department, because we have fewer commodities and general commodities in the classification tariffs, that we do know our freight rates pretty well.

Q. Now going to Respondents' Exhibit 170-B for identification, there appear to be three methods of calculating the averages on the rates which appear on this exhibit; is that not correct (showing exhibit to witness)? That employed in column 6, that employed in column 7 and that employed in column 8.

A. You are talking now of freight rates?

Q. The method of calculating the average freight rates on those shipments.

A. Well, I can't say that I am qualified to answer how they arrived at those averages.

Q. You didn't figure those averages?

A. No, sir.

Q. Now can you state whether the rates appearing under CL, in column 5 include cartage from the plant to the dock?

A. Do you want me to go down the line and ex-
3247 plain each one?

Q. No, I just wondered if you could make an answer which would state categorically about the whole column.

A. Under the car load rates shown in the column referred to, there are seven designations under these car load rates which do not include lighterage free pick-up at our plant. On these seven points it is necessary that we deliver to the New York piers.

Q. Are those seven points indicated in any fashion on the exhibit?

A. I see on this exhibit that only five have been indicated. There are two additional points.

Q. How are they indicated on that exhibit?

A. With the "x" opposite the minimum weight.

Q. What about the other two points?

A. The other two points are on this exhibit but are not so indicated.

Q. Which are those other two points?

A. The other two points are West Palm Beach, Florida and Key West, Florida.

Q. But those have cartage added into those figures; is that right, on those seven points on this exhibit?

A. I can't answer that.

Mr. Wright: I have no further examination of this wit-
ness.

3248 Trial Examiner Norwood: Is there anything further?

Mr. DuBose: No, Mr. Examiner.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Proceed.

Mr. Wright: May I be off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Mr. Baum, will you resume the stand, please?

EDWARD L. BAUM was recalled and, having previously been sworn, testified further as follows:

Cross-Examination by Mr. Wright.

Q. Mr. Baum, as I understand it now, Respondents' Exhibit 170-B, the work sheet, on the plus 3/8 zone on white lead in oil, Exhibit 170-A combines totals from Exhibit 170-B plus other figures from the par zone?

A. That's correct.

Q. And they are all tied together in this summary in Exhibit 171?

A. That represented a transmittal I made up from those two work sheets.

3249 Q. Now will you tell us just from what records you got the information appearing on Exhibit 171 under par pounds sold total cartage and freight for white lead in oil?

A. Yes, sir. That is the last figure I arrived at. I started in by referring to the 1941 record of sales.

Q. What is that record of sales?

A. That is a standard summary of the sales of heavy and soft paste white lead in this particular instance.

Q. For the whole branch?

A. For the Atlantic branch for the year 1941.

Q. It is a total figure for the year then?

A. Yes, and it is arrived at by accumulating the daily pounds of those commodities shipped by the Atlantic branch and checked through the means of a tabulation of the invoices for those commodities against the plant shipping record or warehouse shipping record, if you will.

And the monthly totals by accumulation are checked against stock reports. So that in that way by an accumulation of twelve monthly figures we arrived through what I call my sales accounting record to a total of—well, the total stated on this report.

Q. Does that include all shipments by the Atlantic branch to whatever customer?

A. That includes all shipments billed.

Q. Would that include shipments to the Du Pont Company?

3250 A. No.

Q. Under a contract?

A. It would not include the shipments to the Du Pont Company because that is an inter-branch billing proposition.

Q. Would that include all other shipments then?

A. No. It would only include those shipments to customers, to the classification we call customers' accounts receivable.

Q. Who are in that classification of customers' accounts receivable?

A. Well, there are several thousand customers, but it does exclude all what we call company branches and subsidiaries with the possible exception of one or two foreign or partly owned companies. I don't know those by name.

Q. Would that figure then, the total figure, include shipments to foreign branches and foreign customers?

A. As I say, I don't know them by heart. That is, through memory. But it does possibly include one or two foreign shipments.

Q. What do you mean one or two foreign shipments? Shipments to one or two foreign accounts?

A. I beg your pardon; yes, sir. Shipments to one or two foreign accounts which are associated with the company. I couldn't testify as to what extent because I have no knowledge of it.

Q. Would that also include sales of white lead in

3251 oil to any paint companies?

A. If they are in the category I mentioned before, yes. In fact, many of them no doubt are paint companies. I don't know how many.

That could be obtained from the records, but I don't know that.

Q. That wouldn't necessarily then include just the material packed in cases of 100 pounds or less, would it?

A. Oh, yes, because we sell all of the tonnage on this report—that covers material packed only in kegs of 100 pounds or less.

Q. It wouldn't include then anything in larger containers?

A. No, sir; definitely not.

Q. Sent to larger consumers?

A. We don't put that in this category.

Q. Now where did you get your figure that appears here on your total freight and cartage under that category?

A. Another standard record in the expense accounting system is the expense account which is broken down into several classes of expense and one of which is what we call freight and cartage.

Q. Is that allocated only to white lead in oil?

A. This particular figure on schedule Exhibit 170-A, the total has been taken directly from the expense accounting record of the Atlantic branch for the year
3252 1941 for the amount charged to white lead, heavy and soft expense and for the freight and cartage white lead.

Q. Do you know how that is allocated in the case of mixed billings?

A. I know that we allocate all freight directly. By that I mean on the basis of the weight involved times the rate giving an extension and we accumulate those figures from carriers' invoices.

However, inasmuch as local cartage does enter into these calculations on schedule Exhibit 170-B, we assess or allocate local cartage on the basis of average cost per hundredweight shipped.

Q. In other words, it is an average figure then?

A. That is an average figure which is applied to all our products including white lead in oil.

Q. Then as far as local cartage is concerned, you don't have the actual figure?

A. No, sir; that is an average figure.

Q. And this total freight and cartage includes an average figure?

A. That is an average figure as schedule Exhibit 170-B indicates.

Q. I am talking now but not about the material in Exhibit 170-B but the cartage that is figured into the par zone shipments.

A. But as I explained in the first instance in an-
3253 swer to your first question, the average freight shown for the par zone was arrived at by difference. That is, I took the total of the white lead in oil shipments to customers and the total expense freight and cartage and

from that are deducted the tonnage to Georgia and Florida as well as the calculated amount of freight and cartage applying thereto and by difference I arrived at the quantities sold in the par zone and the freight and cartage applying thereto.

And by an arithmetical calculation arrived at that average freight per hundredweight.

Q. So that the total figure that you started with then was not broken down as between cartage and freight? I am talking now about this—

A. (Interposing.) I didn't quite get that question.

Q. The total that you started with on total cartage and freight—this figure here on Exhibit 170-A—that wasn't broken down in any way?

A. No, sir. That is a total figure as I explained before. It is a total figure applying only to the white lead in oil department though.

Q. Does that include in that total figure any average cartage?

A. It does as I explained before. It is a direct freight charge or outside carriers' charges, but our own company equipment does the local cartage and that is applied
3254 on an average weight per hundredweight based on cartage cost sheets that we maintain in the office.

Q. And you just allocated that cartage based on your cost experience with your own trucking?

A. That's right; yes, sir.

Q. Do you know, Mr. Baum, where the bulk of the shipments represented in this approximate 20,000,000 pounds of white lead in oil sold in the par zone went in the par zone?

A. No, I do not.

Q. You don't know whether it was 95 per cent sold in metropolitan New York or 95 per cent sold some place else?

A. I certainly do not. That information could be obtained, but I don't know it.

Q. You don't know the allocation of it?

A. The records there are just like we got it from Georgia and Florida and we could get it from any state or any city for that matter.

Q. I assume the total freight and cartage figure there also included the foreign freight on those foreign shipments that were in there?

A. Now that brings up a point that I am not sure of for this reason: We formerly carried—rather we formerly maintained the records of the white lead in oil foreign sales as a separate department and, frankly, I am not sure what the date was that we consolidated that
3255 into one total with the domestic, so I cannot answer your question with any degree of accuracy.

I would have to look at the record.

Q. Now the only place then that the Atlantic branch sells outside of par territory is Florida and the eastern half of Georgia, isn't it?

A. To my knowledge, those are the only points to which we sell customers outside of par territory.

Q. Then the Philadelphia branch would no doubt handle all the intervening area there between the southern border of the Atlantic branch and the northern border of eastern Georgia?

A. I wouldn't say that because I don't know.

Q. But you jump over some other branch's territory to get down in there?

A. Yes, we do.

Q. Now on these oxides, what branch handles the car load sales in Florida and eastern Georgia?

A. I don't think I am qualified to say whether it is exclusively—I know that the Atlantic branch ships material down there but I don't know what the territories are.

Mr. Du Bose: May we state, Mr. Wright, that so far as these Respondents' Exhibits 170-A and B for identification and Respondents' Exhibit 171, refer to oxides and we are not offering them for that purpose at all. And
3256 those portions of the exhibit that have reference to oxides may be considered stricken from the sheets since we asked no questions on that.

We are offering it only to show the white lead in oil situation.

By Mr. Wright:

Q. Mr. Baum, isn't this what you did now; didn't you start with two total figures which you knew to be records?

A. Yes, sir.

Q. Total pounds of the branch and total freight?

A. That's correct.

Q. And cartage?

A. Yes.

Q. And then you made hypothetical calculations in this zone on three different freight bases; one, on a straight LCL basis; two, on a car load basis in the quantity shipped at car load rates and three, on a car load basis assuming a single car load to each point in the destination?

Neither one of which conditions necessarily had to apply throughout all those shipments. And then you deducted that from your two factual figures on the book and made these calculations from them?

A. My answer would be yes in the case of the second and third calculations but I just wondered which should qualify—I mean the answer yes as applied to the
3257 LCL, because in looking down the list of destinations here and having checked those rates through the traffic department that are applied, I would say that they—in most instances—yes, in most instances they represent an LCL rate which is not hypothetical.

But in several instances I will admit that they seem to be a total pounds involved which would take a car load rate whereas the calculation is all on an LCL basis.

Q. Many of them could have taken either a car load or a less than car load rate?

A. Yes. Because these, after all, are total figures for the year, and I can't say whether or not, to illustrate, Jacksonville, Florida, 46,897 pounds, might have been one car load and then several LCL shipments.

Q. Statistically speaking now, do you really think that your total figure for par is exactly comparable to your figures for these various points in view of the fact that in your par total figure you have no allocation to show where in the par zone the deliveries were made?

Mr. Du Bose: I object to that question as argumentive.

Trial Examiner Norwood: I think that he may answer. This is cross-examination.

Mr. Du Bose: That is true.

Trial Examiner Norwood: Objection overruled.

3258 The Witness: Well, I can't say between them—I can't say it wouldn't make an infinitesimal difference but as to how much difference when we calculate to four decimal places on an average rate per hundredweight, when you consider the fact that there were 104 tons, a total of 9,826 tons roughly 1 per cent shipped down to the Florida and Georgia zones, that calculation, using the

method I did to arrive at the par average would be hardly noticeable.

I think with four decimal points it might make a one or two point, decimal point, difference.

By Mr. Wright:

Q. You don't have any other territory than the par, the ⅜ and the Atlantic branch?

A. No, sir.

Q. No ⅛ and no ¼?

A. For the white lead in oil?

Q. Yes.

A. Not to my knowledge, no. Can I qualify that?

Q. Yes.

A. Of course, I don't presume to know all the—not all, but to know any of the bases of calculation. That is, the differentials that may be used in the department. These figures that I have prepared cover what I understand to be the only zone differentials that apply to the Atlantic branch for the sales of white lead in oil.

Q. Do you have any warehouses for white lead in 3259 oil in the Atlantic branch?

A. I believe we have—in 1941 you are speaking of?

Q. Yes, sir.

A. It seems to me we had six or eight hundred consignment accounts which were equivalent to warehouses. In other words, the goods were lying there on consignment ready to be withdrawn.

Q. I am talking about a warehouse now to which you ship goods for transshipment to customers.

A. Yes, we did have one in Savannah and there might have been one—I am not sure because of the date which is six years ago—there may have been one in Jacksonville.

Q. Wouldn't the existence of those Savannah and Jacksonville warehouses throw out all your hypothetical calculations showing shipments direct from Brooklyn to those points?

A. Well, as I said, before, I admitted that in the second and third cases they were hypothetical but in the first instance where we marked, I believe, LCL, those are totals and they may or may not have been made up of less than car load shipments in some instances.

Of course, obviously most of them are LCL and they must have taken an LCL rate.

Q. Well now, are you sure, for instance, that all of these shipments went directly from Brooklyn to the customer direct without going through either the Savan-
3260 nah or Jacksonville warehouses?

A. No, I am not sure of that.

Q. In other words, they could have been warehoused in either of those places and been transshipped by truck or something?

A. These are final invoices of sales—final destinations covered by invoices billed to customers.

Q. Now the National Lead Company has a warehouse in Atlanta, doesn't it?

A. I don't know. I am only speaking for the Atlantic branch and they do not have a warehouse in Atlanta.

Q. You don't know of any deliveries from an Atlanta warehouse then into Atlantic branch territory?

A. I don't know of any, no.

Q. You checked all these calculations on here, did you not, Mr. Baum?

A. Yes, sir; I did.

Q. Will you check over the calculation that appears in the top part of the column, column 6, under the heading "freight-gross weights calculated on car load rates?"

A. Now as I understand it, Mr. Wright, you would like me to make—to indicate the weight and the rate—

Q. (Interposing.) No, sir; just check the addition of those figures.

A. Yes, sure.

3261 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. Have you checked that, Mr. Baum?

A. It seems to be out one penny in the total. That figure there is out $200.

Q. That figure is out $200?

A. Yes.

Q. That is the figure of $989.79?

A. That should be $789.79. But the total used in calculating the average is out one penny and the average is not changed at all.

Q. But the total figures are out somewhere?

A. It is out one penny in the total, yes.

Mr. Wright: I have no further questions.

Redirect Examination by Mr. DuBose.

Q. Let me get this straight, Mr. Baum. Going back to Respondents' Exhibit 170-B for identification, the line opposite the words "total Florida" under the heading "freight-gross weight calculated on car load rates," should read $789.79 instead of $989.79; is that correct?

A. That's correct.

Q. Now the total at the bottom of that same col-
3262 umn opposite the words "grand total," however, are correct to one penny; is that right?

A. That's correct.

Q. In other words, in adding total Florida and total Georgia, the figures should be $789.79 plus $657.07; is that correct?

A. Correct to two pennies.

Q. Are you anticipating my question, Mr. Baum.

A. I am sorry.

Q. The total Florida under that heading should be $789.79; is that correct?

A. That's correct.

Q. And the total Georgia under the same heading should be $657.07; is that correct?

A. That's correct.

Q. And the grand total under that same heading should be $1,446.86 instead of $1,446.88 as written; is that correct?

A. That's correct.

Q. So that the grand total which appears on Respondents' Exhibit 170-B for identification under the heading "freight-gross weights calculated on car load rates" is correct to two pennies; is that correct?

A. Yes, sir.

Recross Examination by Mr. Wright.

3263 Q. You heard about Mr. Werne's testimony regarding the seven points in Florida at which cartage was not included in the car load rate used?

A. Yes, sir; I did.

Q. You heard his designation of those seven points?

A. Yes.

Q. Can you tell us whether cartage is figured in those car load rates on the seven points mentioned?

A. Could I tell you whether it is included in there, is that your question?

Q. Yes.

A. It is only included in five of those points, the ones indicated by the "x."

Mr. Wright: I have no further questions.

3264 Mr. DuBose: I reoffer, subject to your ruling of yesterday, Respondent's Exhibit 170-A and B for identification and Respondent's Exhibit 171 for identification, excluding so much of these exhibits as refer to oxides.

Trial Examiner Norwood: What was my ruling of yesterday which counsel referred to?

Mr. Wright: I haven't made any objection to it and I am prepared now to make an objection to the offer.

Trial Examiner Norwood: Proceed.

Mr. Wright: Your Honor, I first want to object on the ground of relevancy. The document is irrelevant because it doesn't relate to individual transactions within a class. It is speaking here now of all shipments in the par zone without regard to where they were shipped and without any breakdown of any sort. It is a total figure with an average which is meaningless.

My second objection is that the document combines actual records with estimates and guesses which make the total conclusion which comes out in Exhibit 170-A and Exhibit 171, a very misleading and erroneous conclusion. In the first place, as it was brought out, they started here with two total figures, the total pounds sold in the whole branch and the total freight in the whole branch. Then they went into the 3/8ths territory and found out how much

3265 was shipped into each town. They figured freight rates to those towns on three different bases and then deducted on the basis of those three different bases from the total figure as if individual shipments were made from Brooklyn to those towns. Then deducting that and deducting the pounds sold there, they were left with the residual sum, being as stated, the pounds sold in par and the total freight and cartage in par.

In the first place, the witness said there were foreign shipments left in that figure which isn't par at all in this foreign freight for all he knows, included in that total on the freight to par. We have no idea of the amount of either one of them but it makes the final calculation a very misleading and an erroneous one based on estimates.

In the second place, he stated that there were at that time two warehouses down here, one in Savannah and one

in Jacksonville, and for all he knows a good many of those shipments went to these warehouses in these places and then were reshipped to the customer, so that these calculations, none of them would apply to such shipments.

Mr. DuBose: Are you through, Mr. Wright?

Mr. Wright: I am through.

Trial Examiner Norwood: I want to ask counsel how to settle these issues to show average costs.

Mr. DuBose: I beg your pardon?

Trial Examiner Norwood: How does it go to the settlement of these issues for you to show average costs?

3266 I think we ought to thrash that out right now and not have any further motions in case the average cost is not going to be determined.

Mr. Du Bose: Your Honor has already admitted various records of this nature.

Trial Examiner Norwood: Yes, I know that.

Mr. Du Bose: Our theory is that the zone method for white lead in oil, as this exhibit relates to, was based upon average freight costs within the particular zones. Whether that be a valid argument is a matter of law. We are trying to show the facts to show that the average cost of shipping in, say, 1th, ¼ or 3ths territories does not exceed the difference between the average par freight cost and the average freight and shipping costs or cartage in the differential territories, but that there is some relation between the two.

Now, whether or not that be valid, as I say, is a question of law, but we believe we are entitled to show that to justify the zone method, so-called.

Trial Examiner Norwood: You think that would go to both issues?

Mr. Du Bose: It would certainly have relevance to both issues based upon all the evidence. There may be part of count number one of the amended complaint which, if interpreted one way would say that these particular

3267 methods were unfair methods of competition regardless of collusion and, of course, count two alleges that they are discriminatory. So I think that this evidence is relevant as to both counts.

Trial Examiner Norwood: What about the objections made to these particular exhibits?

Mr. DuBose: On the relevancy the argument that I made, I think, holds true. All the rest of Mr. Wright's

argument goes to the weight entirely to be given to a document which has been prepared along factual lines. Now, you will notice that there are three different calculations. Mr. Wright says, how do we know that some of these shipments might not have passed through warehouses? Well, assuming that, we made a calculation based upon carload shipments to each one of these points which is the cheapest way you could get them down there, regardless of whether it went through the warehouse or any other place. And, of course, they had to get from the plant to the warehouse first and the National Lead Company had to pay the shipping cost to get them down there before they could be restricted.

Trial Examiner Norwood: In other words, shipping them from the warehouse wouldn't have reduced it in any case, would it?

Mr. Du Bose: It wouldn't have reduced our calculation based on carload rates anyway, and that is why we used the alternative methods.

3268 Trial Examiner Norwood: I am inclined to agree with counsel that the objections go to weight and these can be analyzed and the incorrect features of the exhibits shown, if there are any. I shall give you the benefit of the doubt, that is, with regard to any doubts as to the relevancy on that issue. I think the general proposition would probably be considered in connection with count number one and as to average costs, it might enter some way into our consideration in determining the discrimination issue.

I will overrule the objection and receive the exhibits.

Mr. Du Bose: You are not limiting the reception of this to any particular count?

Trial Examiner Norwood: No. Respondent's Exhibits 170-A and B for identification and Respondent's Exhibit 171 for identification will be received in evidence.

(Whereupon, RESPONDENT'S EXHIBITS 170-A, 170-B, and 171, heretofore marked for identification, were received in evidence.)

Trial Examiner Norwood: Is there anything further of this witness?

Mr. Wright: That is all, your Honor.

Trial Examiner Norwood: You are excused, Mr. Baum.

(Witness excused.)

Mr. Du Bose: May we have a short recess at this
3269 time, your Honor?

Trial Examiner Norwood: We will take a five-minute recess at this time.

(Whereupon, a short recess was taken.)

Trial Examiner Norwood: Come to order. Proceed.

Mr. Wright: Your Honor, I assume that these last two exhibits that were received, 170-A and B, and 171, were received subject to the same restrictions that were placed on other similar material, namely, that unless the basic data were made available to me, that you would entertain a motion to strike.

Trial Examiner Norwood: That is true, we have had that understanding heretofore.

Mr. Ewing: The basic data is at 111 Broadway, and Mr. Baum, I am sure, will be glad to supply it to any Commission representative, except Saturdays.

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: I call Ernest R. Dondorf.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Ernest R. Dondorf, 191-30 114th Road, St. Albans, New York.

ERNEST R. DONDORF, was thereupon called as a witness on behalf of the company and, having been first
3270 duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. What is your full name, please?

A. Ernest R. Dondorf.

Q. What is your address?

A. No. 191-30 114th Road, St. Albans, New York.

Q. Mr. Dondorf, are you employed by the National Lead Company?

A. I am.

Q. In what capacity are you presently employed?

A. As manager of metal purchases.

Q. Will you tell us what your duties are in that regard?

A. Purchases of all virgin material, pig lead, antimony, silver, all virgin materials.

Q. How long have you occupied that position?

A. September 1, 1949.

Q. When were you first employed by the National Lead Company?

A. October 1, 1906.

Q. In what capacity were you then employed?

A. Office boy.

Q. How long did you continue to work as office boy, approximately?

A. Oh, until 1908 or 1909, I would say.

Q. Have you been continuously employed by the
3271 National Lead Company since 1906?

A. No, I wish to correct that. I was originally employed by the United Lead Company in 1906. That was a subsidiary of the National Lead Company.

Q. And have you been continuously employed by the National Lead Company, or one of its subsidiaries?

A. That's right.

Q. What was your next position after you ceased being office boy?

A. Bookkeeper.

Q. How long did you occupy that position, approximately?

A. Oh, until 1913, I would say.

Q. What was your next employment after that?

A. As manager of the export department.

Q. And how long were you manager of that department?

A. Until 1924.

Q. What was your next employment?

A. As assistant secretary of the United Lead Company.

Q. And how long did you occupy that position?

A. Until November, 1928.

Q. And did you go from that position to your present position?

A. No. In 1928 I went into the metal department.

Q. In what capacity?

A. As assistant to Mr. Hall, who was then the manager of the metal department.

3272 Q. And how long did you continue as his assistant?

A. Until 1939.

Q. Are you familiar with the purchases of pig lead by the National Lead Company, say, during the years 1936 to 1941, inclusive?

A. No. I was in the department but I had nothing to do with the purchase of pig lead.

Q. Well, I am asking you now if you are familiar with the purchases during that period?

A. More or less, yes.

Mr. Ewing: I ask that this sheet be marked Respondent's Exhibit 173 for identification.

Trial Examiner Norwood: It will be marked Respondent's Exhibit 173 for identification.

(Whereupon, the document referred to was marked Respondent's Exhibit No. 173 for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Mr. Dondorf, I show you this paper that has been marked Respondent's Exhibit 173 for identification, and ask you whether that was prepared by you or under your direction?

A. Yes, it was.

Q. This document is headed "pig lead purchases (tons)" and purports to relate to the years 1936 to 1941 inclusive. I ask you to state from what source or 3273 sources the information contained in the document was obtained by you.

A. This information was obtained by a yearly statement that we make up in this department every year from permanent records.

Q. Does that statement purport to show the purchases made by the National Lead Company of pig lead during those years?

A. Yes, sir.

Q. Now, will you tell us a little more about what you mean when you said that it was made up from annual statements?

A. Statements like you have in your hand there. We make those up every year.

Mr. Ewing: I ask that these six documents be marked Respondent's Exhibit 174-A to F inclusive for identification.

Trial Examiner Norwood: They will be so marked for identification as Respondent's Exhibit 174-A to F inclusive.

(Whereupon, the documents referred to were marked Respondent's Exhibit 174-A, 174-B, 174-C, 174-D, 174-E, and 174-F for identification.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Will you tell us whether these documents marked Respondent's Exhibits 174-A to F inclusive for identification are records prepared in your department (showing to witness)?

A. Yes, they were.

Q. Are they prepared in the regular course of
3274 business in your department?

A. Yes.

Q. To what use are they put?

A. We prepare these records for the executives primarily to show what went on in the department during that year.

Q. With respect to the purchase of pig lead?

A. That's right.

Q. Now, do the figures shown on the document which has been marked Respondent's Exhibit 173 for identification correctly reflect the figures contained in the records which have been marked Respondent's Exhibit 174 A to F inclusive for identification, as well as the six principal companies from which National purchased pig lead in the years 1936 to 1941?

A. They do.

Mr. Ewing: I offer Respondent's Exhibit 173 for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I have a basic objection to this, on the ground of relevancy and furthermore that the basic data have not been supplied.

Mr. Ewing: As far as the ground of relevancy is concerned, I would say that in view of the allegations of the amended complaint with respect to our alleged control of pig lead prices, it is quite relevant to show from
3275 whom and in what quantities we have been buying pig lead. As far as the basic data is concerned, this is prepared from these other exhibits which I didn't offer and do not intend to unless Mr. Wright would wish me to, simply for the purpose of cluttering the records. They are the records of the department and if there are any other records of the department that Mr. Wright would like to see or have the Commission see, they are welcome to make any examination they would like at any time.

Trial Examiner Norwood: He may have those reports on which this tabulation is based?

Mr. Ewing: Certainly.

Trial Examiner Norwood: That is 174-A to F for identification?

Mr. Ewing: That's right.

Trial Examiner Norwood: What is this recapitulation on the bottom here, Anaconda five thousand and Smelting two thousand?

Mr. Ewing: That is the reference to others in the last year.

Trial Examiner Norwood: Objection overruled. The exhibit will be received as marked. The laboring data will be delivered to Commission's counsel.

(Whereupon, RESPONDENT'S EXHIBIT NO. 173, heretofore marked for identification, was received in evidence.)

3276 Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, Mr. Dondorf, you have testified that since 1939 you have been manager of the metal purchasing?

A. Yes.

Q. When in 1939 approximately did you become manager?

A. September 1st.

Q. Since that date what, if anything, have you yourself had to do with the purchase by the National Lead Company of pig lead?

A. I purchased all the pig lead for the entire company since that time.

Q. Is it within your province to select the source from which you purchase pig lead for the National Lead?

A. Yes.

Q. Will you tell us briefly what considerations enter into the selection by you of any particular company from which you purchase pig lead?

A. Well, it all depends on the grade of pig lead that I wish to purchase, whether chemical corroding or common.

Q. Well, will you explain that answer a little more?

A. Well, if I want to buy a lot of corroding lead, I would first go to the American Smelting and Refining Company and if I couldn't get my supplies from them, then I would go to the other producers.

3277 Q. Will you give us some of the other producers of corroding pig lead?

A. St. Jo Lead Company, United States Smelting Refining and Mining Company, Bunker Hill and Sullivan Mining Company. Those are the principal producers of corroding lead.

Q. From whom do you purchase common pig lead?

A. From the American Smelting and Refining Company, Anaconda Sales Company, Bunker Hill and Sullivan, American Metal Company.

Q. Are the purchases of pig lead as shown on Respondent's Exhibit 173 inclusive of both common and corroding pig lead?

A. That's right.

Q. Is it correct to say that they include all pig lead purchased by National during those years?

A. Correct.

Q. Does anyone else in your department buy pig lead under your supervision?

A. Yes. I have an assistant there.

Q. He works under your supervision?

A. That's right.

Q. Now, as far as you know, have you ever, since your employment in your present capacity, or has your assistant or anyone else in the National Lead Company ever suggested at any time to the American Smelting and Re-
3278 fining Company or any representative of it that it fix or establish a price for pig lead suggested by you or anyone else?

A. No, sir, not at any time.

Q. Would your answer be the same if I put the same question with respect to the other companies from which you purchase pig lead?

A. That's correct.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. Mr. Dondorf, on the basic data from which you compiled this exhibit, there are two categories of lead set out separately, are there not? Refined and common.

A. That's right.

Q. What is the refined lead that is in that basic data?

A. We classify refined lead as corroding lead.

Q. They are synonymous?

A. That's right.

Q. Is there a difference in the proportion of corroding lead over that period purchased from A. S. & R. as against the others compared to the proportion of common lead purchased from A. S. & R. as compared with the others?

A. It all depends, I have got to break that down. I can't tell you from that statement how much is corroding and how much is common.

3279 Q. Will you refresh your recollection as to the portion of corroding lead purchased from A. S. & R. during those years from those documents marked Respondent's Exhibit 174-A to F for identification?

A. Yes. In 1936 from A. S. & R. we purchased 30,465 tons of corroding lead.

Q. Out of a total purchase of how much?

A. Out of a total purchase—

Q. Of corroding lead now.

A. Out of a total purchase of 53,568.

Q. Now, how does that proportion that obtained in that year obtain in the other years there, without giving us the exact figures.

A. I would say about the same percentage each year.

Q. In the period of those years, 1936 to 1941, did the National Lead Company have any contractual relationship with the American Smelting and Refining Company covering its purchases of pig lead, either refined or common?

A. Yes.

Q. Roughly what was that contract?

A. It was always made on a monthly basis either by a flat price or an average for the month.

Q. How were your purchases distributed? Were they principally on the average basis?

A. No. I would say they were more on the flat
3280 price rather than on the average.

Q. Would that be a spot price?

A. That is what I mean by flat price, spot price.

Q. Do those contracts call for you to take any special percentage of your requirements of such lead? I am speaking now of the period from 1936 to 1941.

A. The contracts are made up either in corroding or common grades, you see. They are specified that way.

Q. Do they specify the amount that you shall purchase over a period of time?

A. That's right.

Mr. Wright: I have no further cross-examination.

Redirect Examination by Mr. Ewing.

Q. Over what period of time, Mr. Dondorf?
A. By months.
Q. Month to month?
A. Just month to month, that is all, yes.
Q. And you are free to terminate that arrangement at any time?
A. That's right.
Q. Did the contract or contracts in effect since you have been manager of your department call for the purchase by National Lead of any particular percentage of the requirements?
3281 A. No.
Mr. Ewing: That is all.

Recross Examination by Mr. Wright.

Q. Is it not true, Mr. Dondorf, now, that you are willing to get lead from any source that you can get it?
A. That is true.
Q. For over how long a period has that situation obtained?
A. That was all during the war period, I would say.
Q. How about in 1941?
A. It started in about 1941.
Q. Was there a plentiful supply in 1940?
A. I wouldn't say plentiful but we could get what we needed in 1940.
Q. It still didn't resemble the period in the early thirties though, did it, as far as the availability of supply?
A. That's right.
Q. You say in your experience in the company that you don't recall any requirements contract or any percentage of requirements contract with the American Smelting and Refining Company?
A. I don't remember, no, sir.
Q. But you haven't been in the metals department—how long a period of time is your service in the metals department?
3282 A. 1928.
Mr. Wright: No further examination.
Mr. Ewing: No further questions.
Trial Examiner Norwood: You are excused.
(Witness excused.)

3283 Trial Examiner Norwood: Proceed.

Mr. Ewing: I call Henry O. Bates.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Henry O. Bates, 67 Briarcliffe Road, Mountain Lakes, New Jersey.

HENRY O. BATES was thereupon called as a witness for the Respondents and, having first been duly sworn, testified as follows:

Direct Examination by Mr. Ewing.

Q. Will you please state your full name?

A. Henry O. Bates.

Q. What is your address?

A. 67 Briarcliffe Road, Mountain Lakes, New Jersey.

Q. Mr. Bates, are you connected with the National Lead Company?

A. I am.

Q. In what capacity are you connected with it?

A. Secretary of the corporation.

Q. How long have you been secretary approximately?

A. Since 1938.

Q. When were you first employed by the National Lead Company?

A. 1902.

3284 Q. Have you been continuously employed by that company, National Lead, since then?

A. I was out for a few months in 1905 and 1906.

Q. Now as secretary you are the custodian of the minutes of the National Lead Company's stockholders' meetings, directors' meetings and Executive Committee meetings, are you not?

A. I am.

Q. Have you brought with you minute books covering those meetings this morning?

A. I have brought five of the minute books.

Q. Have you with you the original minutes of the directors' meeting of February 18, 1892 and also of the meeting of March 17, 1892?

A. I have.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 175-A and B for identification.

Trial Examiner Norwood: They will be marked as Respondents' Exhibit 175-A and B for identification.

(The documents referred to were marked for identification Respondents' Exhibit 175-A and 175-B.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. I ask you to turn to the minutes of the Board of Directors' meeting of February 18, 1892.

3285 A. Yes.

Q. What was the next regular meeting of the Board of Directors after the meeting of February 18, 1892?

A. The next meeting recorded, the regular meeting of March 17, 1892.

Q. Now I hand you here with these photostats which have been marked Respondents' Exhibit 175-A and B for identification and ask you whether the photostats set forth in full the minutes of February 18, 1892 and a portion of the minutes of March 17, 1892 (showing to witness)?

A. That is correct.

Mr. Ewing: I offer Respondents' Exhibit 175-A and B for identification in evidence.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I haven't finished reading them, your Honor.

Trial Examiner Norwood: Can you give us a little statement of purpose on this?

Mr. Ewing: Yes, sir. With respect to the meeting of February 18, 1892, I am offering it with specific reference to the last paragraph at the bottom of Respondents' Exhibit 175-A for identification where the resolution appears authorizing the Executive Committee to report on the advisability of discontinuing the manufacture of white lead at one plant and the grinding of lead in oil at an-

3286 other, and I propose to connect that with action that was later taken.

With respect to Respondents' Exhibit 175-B for identification, I am offering it with specific reference to the action indicated by the next to the last paragraph on the page relating to division of territory.

Mr. Wright: With reference to the offer with regard to the next to the last paragraph there, this document stops in the middle of a sentence which is a description of what they meant by the paragraph that counsel has pointed out.

Mr. Ewing: That is not the paragraph. The paragraph

where it stops in the middle of the sentence relates to sales managers and that is not what I am interested in.

It is the paragraph before that and if you want the rest of the minutes in, why we will provide them.

Mr. Wright: May I inquire of counsel about the statement then following are the boundary lines for the several districts at the end of the paragraph?

Mr. Ewing: That is part of the report. As I say, I have no objection to offering all of the minutes. I simply didn't have them photostated because it didn't seem necessary. The originals are right here.

Mr. Wright: I don't see how we could consider receiving the first paragraph of something which continues
3287 on and is broken off right in the middle.

Mr. Du Bose: Why not?

Trial Examiner Norwood: Counsel can examine the minutes here and see if he has any objection.

Mr. Wright: Very well, your Honor. Your Honor, I don't see the relevancy of these exhibits. I would like to make an objection on that ground and I would like to make a further objection about Respondents' Exhibit 175-B that it is incomplete and the statement to which counsel called attention is misleading without having the entire minutes of that meeting included in the exhibit.

I don't think it means anything standing by itself.

Trial Examiner Norwood: Well, counsel can make a careful note of that so that he can introduce the rest of it inasmuch it is available to him.

Mr. Wright: Is it proper to introduce an excerpt out of the minutes in this fashion?

Trial Examiner Norwood: I think so.

Mr. Ewing: I don't know why not.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I shall receive it subject to connection as Respondents' Exhibit 175-A and B in evidence.

(The document referred to, heretofore marked for
3288 identification RESPONDENTS' EXHIBIT 175-A and 175-B, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now I ask you whether you have with you, Mr. Bates, the minutes of the meetings of the Board of Direc-

tors of the National Lead Company held on December 21, 1911 and May 19, 1927?

A. What was that first date?

Q. December 21, 1911.

A. I have.

Mr. Ewing: I ask that these two photostats be marked Respondents' Exhibit 176-A and B for identification.

Trial Examiner Norwood: They will be marked Respondents' Exhibits 176-A and B for identification.

(The documents referred to were marked for identification Respondents' Exhibit 176-A and 176-B.)

By Mr. Ewing:

Q. Now I show you Respondents' Exhibit 176-A for identification and ask you whether that is a correct copy of that portion of the minutes of the Board of Directors' meeting of December 21, 1911, appearing at page 190 of the minute book?

A. That is correct.

Q. And I show you Exhibit 176-B for identification 3289 and ask you whether it is a copy of that portion of the minutes of that same meeting appearing at page 192 of the minute book?

A. That is correct.

Mr. Ewing: I offer those photostats which have been marked Respondents' Exhibit 176-A and B for identification, being a portion of the minutes of the meeting of the Board of Directors of the National Lead Company held December 21, 1911 with the statement that the rest of the minutes are available and here and if counsel wishes to have a copy we will provide him with it.

But it doesn't seem to be necessary for us to burden the record with other than these two portions. I should say that I offer them specifically for showing the resignation from the Board of Messrs. Daniel and Murry Guggenheim and also the resignation from the Board of Mr. Edward Brush.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: In view of counsel's statements with regard to the availability of these records and further of the limited purpose of the offer to show the resignation of these men, I have no objection.

Trial Examiner Norwood: They will be received in evidence as Respondents' Exhibit 176-A and B.

(The document referred to, heretofore marked for
3290 identification RESPONDENTS' EXHIBIT 176-A and 176-B, was received in evidence.)

Trial Examiner Norwood: Proceed.

By Mr. Ewing:

Q. Now, Mr. Bates, have you with you the minutes of the meeting of the National Lead Company's Board of Directors held on May 19, 1927?

A. I have.

Mr. Ewing: I will ask that these two photostats be marked Respondents' Exhibit 177-A and B for identification.

Trial Examiner Norwood: They will be marked for identification as Respondents' Exhibit 177-A and B.

(The document referred to was marked for identification Respondents' Exhibit 177-A and 177-B.)

By Mr. Ewing:

Q. Now I show you, Mr. Bates, Respondents' Exhibit 177-A and B for identification and ask you whether they correctly reproduce the minutes of the meeting of May 19, 1927 (showing to witness)?

A. They do.

Q. Respondents' Exhibit 177-A for identification is a reproduction of that portion of the minutes which appears in the minute book which you have produced as page 73?

A. Yes, sir.

3291 Q. And Respondents' Exhibit 177-B for identification is a reproduction, is it not, of that portion of the minutes which appears on page 76 of the minute book?

A. Yes, sir.

Q. So that when you answered my question a moment back, you did not intend to imply that these two sheets covered the entire minutes of that meeting?

A. That's correct.

Mr. Ewing: I offer Respondents' Exhibit 177-A and B for identification and, in particular, the last formal resolution which appears on Exhibit 177-B for identification relating to the minimum differential price on oxides.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: I object to the offer, your Honor, on the ground that this is incomplete. It is only a portion of the minutes.

Mr. Ewing: I make the same proffer with respect to the rest of the minutes.

Trial Examiner Norwood: Is there anything further?

Mr. Wright: No, sir.

Trial Examiner Norwood: The exhibit will be received as marked. Objection overruled.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 177A and 3292 177-B, was received in evidence.)

By Mr. Ewing:

Q. Mr. Bates, have you with you the original minutes of the annual stockholders meeting of February 16, 1893?

A. I have.

Trial Examiner Norwood: Were you secretary at that time?

The Witness: No, sir.

Mr. Ewing: I ask that this sheet be marked Respondents' Exhibit 178 for identification.

Trial Examiner Norwood: It will be marked for identification as Respondents' Exhibit 178.

(The document referred to was marked Respondents' Exhibit 178 for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 178 for identification and ask you whether that correctly reproduces the fourth page of the minutes of that meeting, page 20 of the minute book in your hands?

A. That is correct.

Q. That is the meeting of the stockholders' meeting, annual meeting, of February 16, 1893; is that right?

A. That is right.

Mr. Ewing: In this case, I would like to offer all of the minutes of that meeting which appear in this
3293 minute book of annual meetings of stockholders at pages 17 to 24 and would like the opportunity to substitute photostats which will be made and supplied.

Mr. Wright: I have no objection to that procedure.

Mr. Ewing: This is the first annual meeting.

Trial Examiner Norwood: You will deliver the photostats to the reporter before he sends in the transcript?

Mr. Ewing: Yes, your Honor. I ask that these be marked Respondents' Exhibit 179-A to G inclusive for identification.

Trial Examiner Norwood: They will be so marked for identification as Respondents' Exhibit 179-A to G inclusive.

(The document referred to was marked for identification Respondents' Exhibit 179-A, 179-B, 179-C, 179-D, 179-E, 179-F and 179-G.)

Trial Examiner Norwood: What is the purpose of that offering?

Mr. Ewing: I would be glad to state the purpose.

Mr. Wright: Has it been offered yet?

Mr. Ewing: Yes. The offer relates particularly to that portion of the minutes appearing on page 20 of the minute book "A" of the stockholders' meetings of the National Lead Company relating to the discontinuance of certain white lead factories and the enlargement of others.

3294 And also with respect to the following portions of the president's report of which the reference on page 20 is a part appearing on page 21 of the minute book "A."

Trial Examiner Norwood: When that is photostated will it include the page numbers there?

Mr. Ewing: Yes, sir.

Mr. Wright: As I understand it, it runs from page 17 to page 21.

Trial Examiner Norwood: Through page 24.

Mr. Ewing: It starts on page 17 and ends here.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Wright: Your Honor, I object to the reception of this exhibit in evidence as competent evidence for the proffer which counsel has made. It consists of self-serving declarations to the stockholders that the company does not want to maintain a monopoly and that there will always be goods manufactured by the company, and they have brought a new efficiency to the business by closing up badly operated and uneconomic plants and so forth.

It has no evidentiary value of any sort. It is pure self-serving declarations by the company to its stockholders and the fact that it was made in 1892 doesn't lend it any more weight than if it was made last week.

3295 Mr. Ewing: We are charged with having started in business practically as a monopoly and it bears directly on that issue.

Trial Examiner Norwood: You charge that they ac-

quired these properties and they have admitted acquiring these properties.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: I don't think we can stop them from giving their explanation of it.

Mr. Ewing: Made at the time.

Mr. Wright: A pious declaration to the stockholders at the time that they had no aim to create a monopoly certainly is not evidence.

Mr. Ewing: Characterize it as you will, the fact remains that that is the record.

Trial Examiner Norwood: I think they have the right to put that in. Objection overruled. It will be received as marked, Exhibit 179-A to G inclusive with photostats to be supplied. The photostats will be the originals and given to the reporter.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 179-A, 179-B, 179-C, 179-D, 179-E, 179-F and 179-G, was received in evidence.)

By Mr. Ewing:

3296 Q. Mr. Bates, have you with you the minutes of the annual meeting of stockholders of the National Lead Company held on April 19, 1906?

A. I have.

Mr. Ewing: I ask that these two photostats be marked Respondents' Exhibit 180-A and B for identification.

Trial Examiner Norwood: They will be marked Respondents' Exhibit 180-A and B for identification.

(The document referred to was marked for identification Respondents' Exhibit 180-A and 180-B.)

By Mr. Ewing: I show you photostats which have been marked Respondents' Exhibit 180-A and B for identification and ask you whether they correctly reproduce pages 120 and 124 of the minutes of the annual stockholders' meeting of April 19, 1906 (showing to witness)?

A. They do.

Mr. Ewing: I offer Respondents' Exhibit 180-A and B for identification for the purpose of showing the election to the Board of Directors of the National Lead Company of Messrs. Daniel Guggenheim, Murry Guggenheim and Edward Brush.

Mr. Wright: I have the same objection with regard to the incompleteness of the exhibit. But if it is received

under the same stipulation and limited purpose as stated by counsel, then I have no objection.

3297 Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 180-A and B.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 180-A and 180-B, was received in evidence.)

By Mr. Ewing:

Q. I ask you, Mr. Bates, whether you have here the minutes of the meeting of the Executive Committee of the Board of Directors of the National Lead Company held on January 14, 1932?

A. I have.

Mr. Ewing: I ask that these two sheets be marked Respondents' Exhibit 181-A and B for identification.

Trial Examiner Norwood: They will be marked as Respondents' Exhibit 181-A and B for identification.

(The document referred to was marked for identification Respondents' Exhibit 181-A and 181-B.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 181-A and B for identification and ask you whether they correctly reproduce page 602 of the minutes of the Executive Committee meeting of January 14, 1932 (showing to witness)?

A. They do.

Mr. Ewing: I offer Respondents' Exhibit 181-A and B for identification with the statement that the orig-

3298 inal minutes in their entirety are available to the Commission at any time and for the specific purpose of having received in evidence the first full paragraph on Resepondents' Exhibit 181-B for identification being a resolution in regard to certain prices on certain products.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: In view of counsel's statement about the availability of the minutes and of the limited purposes of the offer, I have no objection.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 181-A and B

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 181-A and 181-B, was received in evidence.)

By Mr. Ewing:

Q. Now I ask you, Mr. Bates, whether you have with you the original minutes of the Executive Committee of January 6, 1935?

A. June 6th.

Q. June 6 is correct.

A. I have.

Mr. Ewing: I ask that this sheet be marked Respondents' Exhibit 182 for identification.

Trial Examiner Norwood: It will be so marked as Respondents' Exhibit 182 for identification.

3299 (The document referred to was marked Respondents' Exhibit 182 for identification.)

By Mr. Ewing:

Q. I show you Respondents' Exhibit 182 for identification and ask you whether that correctly reproduces the minutes of the meeting of June 6, 1935 of the Executive Committee?

A. It does.

Mr. Ewing: I offer Respondents' Exhibit 182 for identification, it being the entire minutes of that meeting and with particular reference to the last full paragraph prior to the notation of adjournment.

Trial Examiner Norwood: Is that just one page?

Mr. Ewing: Yes, sir.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection, your Honor.

Trial Examiner Norwood: It will be received in evidence as Respondents' Exhibit 182.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 182, was received in evidence.)

By Mr. Ewing:

Q. Referring back to Respondents' Exhibit 180-A and B being a portion of the minutes of the annual meeting of the stockholders of the National Lead Company held on April 19, 1906, I call your attention to the recording 3300 in those minutes of the election to the Board of Directors of Messrs. Daniel Guggenheim, Murry Guggenheim and Edward Brush. Do you know who Mr. Edward Brush was?

A. I never knew him.

Q. Do you know who he was?

A. He was connected with the American Smelting & Refining Company.

Q. Do you know what interest or interests he represented on the Board during the period he was on the Board?

A. Only by hearsay.

Q. Well, will you tell us?

A. Those three gentlemen, Mr. Brush and the other two, were in the American Smelting & Refining Company which at the time held something of a stock interest in the National Lead Company.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. Is it customary, Mr. Bates—I withdraw that.

Mr. Wright: I have no cross-examination.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Trial Examiner Norwood: Proceed.

Mr. Ewing: I now suggest that we adjourn for lunch, your Honor.

3301 Trial Examiner Norwood: We will recess at this time until 2:00 o'clock.

(Whereupon, at 12:50 p. m., a recess was taken until 2:00 p. m., this day.)

3302 Afternoon Session. 2:00 p. m.

Trial Examiner Norwood: Come to order. I want to dispose of this motion and that is the motion of Mr. Wright that the following testimony be stricken, to wit, page 2551 lines 17, 18 and 19, page 2710 line 5 beginning with the words "but facing" and through 19.

Now on page 2721 line 21 through page 2725 line 4, all of the statements of the witness, the answers of the witness contained in that part of the transcript.

Now on page 2729 line 2 through 2730 line 9.

I have given all this material and the arguments of counsel very careful consideration and I feel that this material consists of general statements and conclusions which, as shown at page 2729 to 2730 line 9 and elsewhere, were based on general impressions and not on any definite factors or information which prudent businessmen would rely on in determining whether their costs of sale and delivery were equal to or more than their price differentials.

In fact, it appears affirmatively that the witness had not attempted to reduce cost differences to a specific figure and it was further stated that it would "not have been practicable nor would it have been prudent" to allocate various costs to different classes of customers who received different prices.

3303 I think the law places the duty on this respondent to make such factual determinations in order to justify its price differentials. On the issues raised in count No. 2, the burden of proof cannot be sustained by general observations not supported by some substantial data.

Conclusions from this witness are not admissible in any case, but if accompanied by a factual basis, would probably be received in an administrative investigation such as this. But in the absence of these bases, I feel that this testimony is neither reliable, probative nor substantial and it would be of no advantage to the respondent for me to leave it in the record. It should be stricken in the interest of consistent procedure and to avoid any injurious precedent in this case.

The motion is therefore allowed.

Mr. Hinds: Exception.

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: I call Charles Simon.

Trial Examiner Norwood: Mr. Reporter, this is Mr. Charles Simon, 8466 Radnor Road, Jamaica, New York.

CHARLES SIMON was thereupon called as a witness for the Respondent and, having first been duly sworn, testified as follows:

3304 *Direct Examination by Mr. Ewing.*

Q. Will you please state your full name?

A. Charles Simon.

Q. What is your address?

A. 8466 Radnor Road, Jamaica, New York.

Q. Mr. Simon, are you connected with the National Lead Company?

A. Yes.

Q. In what capacity?

A. Treasurer.

Q. How long have you been treasurer?

A. Since 1925.

Q. When were you first employed by the National Lead Company?

A. November 1904.

Q. Will you give us chronologically the course of your employment by way of the positions occupied by you?

A. I came as office boy and I worked in the stock transfer department and became stock transfer clerk, assistant treasurer.

Q. When did you become assistant treasurer?

A. 1915 and director in 1935.

Q. Then you were treasurer of the National Lead Company in 1930?

3305 A. Yes.

Q. Will you tell us briefly what was the investment policy of National Lead at that time?

A. Just short term investments in Governments and municipals.

Q. At or about that time did the company sometimes have occasion to invest in stocks or bonds of other industrial companies?

A. Occasionally.

Q. When such investments were made was there any limitation, generally speaking, from the standpoint of the business in which the companies were engaged?

A. Well, those investments we made, with the exceptions, they were very small investments. It wasn't anything that amounted to anything.

Q. When you did make such an investment, in what sort of a company would you purchase the securities?

A. I think we would look into the investment and see how much we knew about a particular company and the business of the company.

Mr. Ewing: I ask that this be marked Respondents' Exhibit 183 for identification.

Trial Examiner Norwood: It will be marked Respondents' Exhibit 183 for identification.

(The document referred to was marked for identifi-
3306 cation Respondents' Exhibit 183.)

By Mr. Ewing:

Q. Will you tell us whether the National Lead Company at any time made any investment in the stock of the Eagle-Picher Lead Company?

A. Yes.

Q. Have you examined the records of the National Lead Company to ascertain by date the number of shares purchased in Eagle-Picher from time to time by or on behalf of National together with the purchase price per share, the cost of shares and the number of shares, if any, sold and the dates of sale, the sales price per share and the proceeds?

A. Yes.

Q. I have handed you Respondents' Exhibit 183 for identification and ask you to state whether that was prepared by you or under your direction?

A. Yes, that is correct.

Q. Does that exhibit correctly reflect the information therein set forth as obtained by you or under your direction from the books of the National Lead Company?

A. Yes.

Mr. Ewing: I offer it in evidence as Respondents' Exhibit 183.

Mr. Wright: From what records was this obtained, Mr. Simon?

3307 The Witness: From the books of the company.

Mr. Wright: What particular books contain this?

The Witness: The principal books of the company.

Mr. Wright: I have no further voir dire.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: Your Honor, I have no objection to the receipt of this document in evidence provided that it is under the same category as the earlier exhibits so that I may have an opportunity to examine the basic data.

Mr. Ewing: That is understood.

Trial Examiner Norwood: Does that exhibit make a reference to the basic data in any way?

The Witness: No, it doesn't say that.

Mr. Ewing: It was taken off the books to show these various things.

Trial Examiner Norwood: It will be received under those conditions as Respondent's Exhibit 183.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 183, was received in evidence.)

By Mr. Ewing:

Q. Now will you tell us generally, Mr. Simons, the circumstances under which National purchased these shares in the Eagle-Picher Lead Company?

A. That is a long time ago, but as I recall it, I
3308 think we had some telephone calls from some brokers in Cincinnati. They called our attention to these shares, and that there was a block of stock that was apparently available.

And we had some investment funds there. At times we had an insurance fund, a fire insurance fund and so forth, and occasionally we would go into some other investments. In this particular case this stock was called to our attention and the broker kept offering it and we bought at times when we thought the price was right.

Q. When you say when you thought the price was right, do you mean by that, when you thought the price was low?

A. That's right.

Trial Examiner Norwood: This is the number of shares that National held of Eagle-Picher at these various times?

Mr. Ewing: Yes, and the sales dates.

Trial Examiner Norwood: I am referring to Respondents' Exhibit 183.

Mr. DuBose: It shows both.

By Mr. Ewing:

Q. Now in whose name was this stock purchased?

A. In the name of E. J. Cornish, Edward J. Cornish.

Q. During the time that National Lead held stock in Eagle-Picher in the name of E. J. Cornish or Edward J. Cornish was, so far as you know, National Lead ever
3309 represented on the Board of the Eagle-Picher Company?

A. No.

Q. During the same period of time, so far as you know, did National or anyone in its behalf attempt to exercise any control or influence the Eagle-Picher Company in the management or conduct of its business?

A. I say no.

Q. During the period in which the stock was held by National was that stock voted?

A. I believe it was.

Q. Under what circumstances, if you know?

A. Well, I think it is our general policy of our company—we know something about proxies and stockholders, the action of stockholders in voting their shares, the lethargy—that it was our duty as a stockholder to really vote the stock if we felt everything was all right.

Q. And how did you vote the stock, if you know?

A. I think by regular proxy.

Q. Now what was your connection with the National Lead Company in 1906?

A. I was in the stock transfer department.

Q. There has been testimony here in this case as to the ownership of stock of the National Lead Company by one or more of the Guggenheims and Thomas Fortune Ryan. And there has also been testimony that Messrs.
3310 Daniel Guggenheim and Murry Guggenheim and Mr. Brush were elected to the Board of Directors of the National Lead Company, I believe, in April 1906.

Do you know approximately when the Guggenheims acquired and offered for transfer stock of the National Lead Company?

A. I think it was the early part of 1906.

Q. Upon what is your recollection based?

A. I recall they had—one of their runners that always came—one of their representatives always come in to collect the checks for seals to us. He came in with a black bag—I recall it distinctly—and opened it up and pulled out a load of stock certificates.

Q. How many shares were in it?
A. I would say it was thirty-five thousand shares or more.
Q. What did he do with them?
A. It was all endorsed for transfer and he left it with us for examination and transferred it in the name of some individuals, some nominees.
Q. And at that time you were transfer clerk?
A. Yes.
Mr. Ewing: No further direct.

Cross-Examination by Mr. Wright.

Q. When did you receive this call from the brokers
3311 about the availability of this Eagle-Picher stock, Mr. Simon?
A. Oh, during the general business hours we got them.
Q. When in point of time, the dates?
A. The dates?
Q. Yes.
A. I think over the period from 1930 to 1932.
Q. Were you referring to a particular call from brokers in Cincinnati?
A. No, occasional calls.
Q. Who were the brokers in Cincinnati that called?
A. A. & J. Frank.
Q. A. & J. Frank?
A. Yes. I think there was a Mr. Kaplan.
Q. Is he the gentleman that called?
A. I believe he did most times.
Q. Did he call you?
A. He called me and sometimes he called Mr. Cornish.
Q. Do you know what he said to Mr. Cornish?
A. He simply said or told him that they had these shares of stock for offer and it looked to him like a good opportunity to buy some stock at a reasonable price.
Q. Now did you listen in on this phone conversation?
A. Well, Mr. Cornish repeated it to me and that is about the same thing that Mr. Kaplan told me, too, that these shares were up for sale and that he had them
3312 available and he could probably contact—
Q. (Interposing.) Did he know you had an interest in acquiring Eagle-Picher stock?
A. He didn't know it but he thought we might be a

possible customer. I imagine he probably asked other people too.

Q. In this period now from 1930 to 1932, how many other industrial stocks did National have in its investment folio?

A. We might have had a few shares of American Smelting & Refining.

Q. Can you think of any other stocks now that you might have had?

A. We may have had some bonds of the St. Joe Lead.

Q. They would be bonds?

A. Bonds, yes.

Q. You can only think of one other common stock then in which you invested?

A. That's right.

Q. Did this broker customarily call you about other stocks and tell you they were available?

A. He might have.

Q. You don't recall his doing it?

A. I don't recall right now.

Q. Was it customary to receive calls from him about stocks being available? I mean outside of this incident.

A. That was his business to look for customers.

3313 Q. Was this stock held on the transfer records of the Eagle-Picher Company in the name of the National Lead Company?

A. No, Edward J. Cornish.

Q. Under E. J. Cornish?

A. Yes.

Q. Why was that arrangement resorted to?

A. That made it easier to transfer, a simple transfer.

Q. Will you explain that?

A. Well, stock in the name of the corporation calls for certain requirements whereas in the name of an individual you can just simply transfer that stock on the basis of his endorsement.

Q. When you speak of requirements there you are thinking of the requirements of retransferring it?

A. Stock transfer requirements, yes.

Q. Was it customary—I withdraw that. Did you have any other stocks or bonds in your investment folios which were on the transfer books in the name of an individual?

A. Yes, I believe in most cases if we held anything for a transfer nature we put it in the name of an individual so that it was available for resale.

Q. Was that the case with the bonds that you held?
A. They were bearer bonds.
Q. They were bearer bonds?
3314 A. Yes.
Q. Then the only other stock that you held in that period was A. S. R. stock?
A. That's right.
Q. Was that held in Mr. Cornish's name?
A. That was held in the National Lead Company.
Q. What other stock was held in the name of an individual during that period?
A. We had a number of stocks, I think probably some one or two small stocks, whenever we had a transfer which we felt we would liquidate sooner or later, we left it in the name of the individual. But in the case of the A. S. & R. stock, that was simply one of those conditions there that we figured the name of the National Lead Company would be all right, because there was a different condition that existed there.
The offer was made in a big block by a bank.
Q. How big a block was it?
A. Well, I guess it was about twenty thousand shares.
Q. Of A. S. & R.?
A. Yes.
Q. That you held at that time?
A. Yes.
Q. Do you still hold a substantial interest?
A. No.
Q. Why was it all right to hold the A. S. & R.
3315 stock in the name of the National Lead Company and not all right to hold the Eagle-Picher stock?
A. I don't think there was a question of it being all right. I don't think so, that isn't the point. It was just a question of convenience there, that is about all.
Q. Well now, this broker that called about the block of stock that was available, I notice your first purchase was just about 100 shares?
A. Yes.
Q. Was that the block you mentioned?
A. That is what he had available I think. That is what he spoke about and brought on the condition which eventually led to the purchase of this amount of shares that we had.
Q. Then the next day, July 30th, there was another

block of 400 shares and then two and a half months later another block of 300 shares?

A. Yes.

Q. And then thirteen days later another block of shares?

A. Yes.

Q. And the next day another block of shares?

A. Yes.

Q. Are you sure that there wasn't a standing order with this broker to purchase that Eagle-Picher stock as he acquired it?

A. No, there was not.

3316 Q. Each one of those was a separate order and a separate transaction to that broker?

A. Absolutely.

Q. And they were all handled through that broker?

A. I think they were, yes.

Q. Do you know what the total number of shares of capital stock of the Eagle-Picher Company were at that time?

A. I think it was about close to a million shares.

Q. Close to a million shares?

A. A million shares, yes.

Q. Of common stock?

A. Common stock, yes, about nine hundred thousand or a million, I believe.

Q. Did any of the other officers of the National Lead Company or anyone associated with them hold any stock at that time in Eagle-Picher that you know of?

A. Not that I know of, no.

Q. Can you recall the circumstances under which the stock was voted? You said it was voted by proxy.

A. Yes. Well, the proxy that they sent out to vote. Each stockholder receives a proxy at every annual meeting. That is a requirement.

Q. What did you do, just fill in that proxy and just send it?

A. Yes. In the first place, it was signed by Mr.

3317 Cornish because the stock was in his name, you see.

Q. Mr. Cornish was the one that sent the proxy in, did he?

A. Yes.

Q. Do you know how he filled out those proxies?

A. He just signed the proxy. I think later on the stock was put in the name of the National Lead Company and that was after Mr. Cornish died in 1938.

Q. In other words, Mr. Cornish never retained personal possession of that stock?

A. No.

Q. It was always in the possession of the National Lead Company?

A. Yes.

Q. Now going back to 1906, will you tell us again about this runner coming in, Mr. Simon?

A. Well, just as I said, he came in. I was a stock transfer clerk and, of course, naturally a thing of that kind really would come to your attention to see a man come in with his bag and open it up and pull out a great big bunch of stock certificates and throw them out there for transfer.

Q. Were you advised at that time that that was Guggenheim or associated interest stock?

A. The only thing I saw there was 71 Broadway, the name of five or six nominees.

Q. You did actually examine the certificates?

3318 A. We had to in order to see that the transfers were valid.

Q. These were transfers in 1906 to the Guggenheims?

A. That's correct.

Mr. Wright: Your Honor, I have no more cross-examination. I would like at this time to move to strike that part of the witness's testimony though which related to conversations repeated to him by Mr. Cornish regarding telephone calls that he received from brokers. I will say that I didn't object to that on direct examination because it didn't appear at that time that he was repeating what Mr. Cornish had told him someone told him on the telephone.

Mr. Ewing: The answer to his move to strike was an answer to his question and, furthermore, the witness testified that the broker told him the same thing.

Trial Examiner Norwood: I think that is part of the picture he is giving here. I don't think that his testimony is of such a nature to require us to be too meticulous about that. Motion denied.

I notice these sales here in 1937, the prices are different from $3 in 1937—$25 a share. There was a different stock setup?

The Witness: I beg your pardon?

Mr. Ewing: That was the profit they made on the investment.

Trial Examiner Norwood: This is sales on this side?

3319 Mr. DuBose: That's right.

Trial Examiner Norwood: Is there any further examination?

Redirect Examination by Mr. Ewing.

Q. Mr. Simon, at the purchases of Eagle-Picher's stock as shown on Respondents' Exhibit 183, was the Eagle-Picher stock listed on the New York Stock Exchange, if you recall?

A. No, I don't think so. I don't believe it was.

Q. Now if you will look at Respondents' Exhibit 183, I call your attention to the column headed "cost" and the total insofar as it relates to common stock of $226,630. Was that the total cost of the common stock purchased by or on behalf of National Lead?

A. Yes.

Q. Then in the last column on the right headed "proceeds" again relating to the common stock, I call your attention to the total $1,086,014.03. Does that represent the gross proceeds received by National in selling the Eagle-Picher stock?

A. Yes.

Q. So that the difference between the total of the cost column and the total of the proceeds column, less whatever transfer or brokerage charges there may have been, represents profit to National Lead?

3320 A. Yes. There are no brokerage charges.

Q. The difference is the net profit?

A. It is all included, yes.

Mr. Ewing: No further questions.

Trial Examiner Norwood: Do they still hold in Eagle-Picher?

The Witness: No, sir.

By Mr. Ewing:

Q. Do you now hold any AS & R stock?

A. No.

Q. What disposition was made of the St. Joseph Lead Company bonds?

A. They were all sold. It was just held for a period of, I guess, four or five years or so.

Q. Did National's investment in either Eagle-Picher

stock or AS & R stock or in the St. Joe Bonds represent an investment of a permanent nature?

A. No.

Mr. Ewing: That is all.

Recross Examination by Mr. Wright.

Q. Mr. Simon, when you were answering about any control or suggestions by the National Lead Company to the Eagle-Picher Company, when you stated that you knew of no one, you meant that you personally knew of no
3321 exercise of control of that stock to the Eagle-Picher Company?

A. Yes.

Mr. Wright: That is all.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. By agreement of counsel the hearing is adjourned to reconvene July 22, 1947, Washington, D. C., office of the Federal Trade Commission, Room 332 at 10:00 a.m., city time. That is, Eastern Daylight Saving Time.

(Whereupon, at 2:50 p.m., the hearing was adjourned to reconvene in Washington, D. C., July 22, 1947, at 10:00 a.m., EDST.)